EDITOR'S NOTE

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90-941

NO.

In The

Supreme Court Of The United States

OCTOBER TERM, 1990

THE TOWN OF SUNNYVALE, TEXAS,
Petitioner,

vs.

CHARLES MAYHEW, SR., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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QUESTIONS PRESENTED FOR REVIEW

1. In a taking analysis, may a state court disregard established federal precedent that the issues of ripeness and futility are legal issues and treat such issues as fact issues that require the reversal of summary judgment?

2. Should a state court focus its taking analysis solely on a municipality's decision to deny a requested zoning use without considering the remaining uses left to the zoning applicant under the municipality's zoning ordinance, in determining that a taking of property may have occurred?

3. Is a procedural due process challenge to a municipal zoning decision precluded by a determination that the decision is a legislative act?

4. Is any factual predicate necessary prior to determining the facial constitutionality of a municipal ordinance?

LIST OF PARTIES

1. The Petitioner herein, Defendant in the trial court, is the Town of Sunnyvale, Texas.

2. The four Respondents herein, Plaintiffs in the trial court, are Charles Mayhew, Sr., Charles Mayhew, Jr., The Estate of Audrey Mayhew and Sunnyvale Properties, Ltd.

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Texas Supreme Court entered on September 12, 1990.

OPINIONS BELOW

The opinion of the Texas Court of Appeals at Dallas is reported at 744 S.W.2d 284, and is reprinted herein at App. 4. The judgment of the Court of Appeals was rendered and entered on June 9, 1989, and is reprinted herein at App. 34. The Texas Supreme Court's decision not to review the judgment of the Court of Appeals, which determination was made on September 12, 1990, is reprinted herein at App. 36. The April 22, 1988, Order and Judgment of the 192nd Judicial District Court of Dallas County, Texas, have not been reported. They are reprinted herein at App. 1 and 2, respectively.

JURISDICTION

On September 12, 1990, the Texas Supreme Court decided not to review the judgment and opinion of the Texas Court of Appeals. No motion for rehearing was sought in the Texas Supreme Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION, Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Sunnyvale ("the Town") is a suburb of Dallas, Texas, and is located approximately 12 miles east of downtown Dallas.

The Town, a general law municipality, comprises approximately 10,941 acres of land and, according to 1980 census data, had 1,404 residents.

Respondents ("the Mayhews") are prospective land developers who in January, 1987, owned a 1,196-acre tract of land in the Town, 116 acres of which are located within a flood plain and are not recoverable. The challenged legislation at issue, the Town's Zoning Ordinance, was passed and approved by the Town Council in 1983. Article XV of the Zoning Ordinance (App. 38) provides for the approval and development of planned development districts within the Town. The stated intent of the planned development district is

> to provide a flexible, alternative zoning procedure to encourage imagination and innovative design for the unified development of large tracts of land, within overall use regulations set forth in [the Zoning Ordinance], the general land use plan, the thoroughfare plan, and the goals and policies for development of [the] Town.

App. 38.

On July 3, 1986, the Mayhews filed an application for planned development approval ("the application") with the Town, which in its final form requested 3,500 units for the 1,080 developable acres of land, or a density level of more than 3.2 units per acre, within the development tract. On August 28, 1986, the Town's Planning and Zoning Commission initiated a series of public workshops regarding the application. These workshops, as well as numerous meetings and hearings, were conducted over the course of four months, and the Town's minutes reflect that the Mayhews' application was discussed at Planning and Zoning Commission and Town Council meetings on approximately 24 different dates. A review of the minutes reveals the Town's

concerns pertaining to, among other matters, the availability of sanitary sewer to the Mayhews' proposed development, the maintenance of a scenic, rustic and rural environment characterized by low-density housing, and the preservation of open space with the concept of one-acre lot zoning.

On November 20, 1986, the Planning and Zoning Commission recommended to the Town Council that the application be denied as submitted. A public hearing on the application was held by the Town Council on December 22, 1986, and a subsequent two-day public hearing was held on January 12 and 13, 1987. On the latter of those dates, the Town Council denied, by a four-to-one vote, the Mayhews' application at the proposed density of approximately 3.2 units per acre. The Mayhews did not submit another application for planned development at a lesser density level, but rather initiated this lawsuit on March 6, 1987, against the Town and the four Town Councilmembers who voted to deny the application.

The Mayhews' state court pleadings alleged, in part, that the Town's zoning legislation and land use decisions violated the Mayhews' Fifth and Fourteenth Amendment rights to procedural and substantive due process and equal protection (facial and as applied) and that the Town Council's decision effected a taking of the Mayhews' property without just compensation. The parties conducted extensive discovery and the Town moved for summary judgment on all counts. The motion for summary judgment was accompanied by a two-volume set of summary judgment proof. The trial court granted the motion for summary judgment in its entirety on April 22, 1988. App. 1. The Mayhews appealed that decision to the Texas Court of Appeals at Dallas and on June 9, 1989, that court rendered its opinion

and judgment, affirming the trial court in part, and reversing and remanding the federal constitutional issues to the trial court. App. 4 and 34, respectively.

The Town timely filed its application for writ of error with the Texas Supreme Court, specifically raising the aforementioned federal constitutional issues as points of error. On September 12, 1990, the Texas Supreme Court denied the applications for writ of error filed by both the Town and the Mayhews. App. 36.

REASONS FOR GRANTING THE WRIT

I.

In a taking analysis, a state court may not disregard established federal precedent that the issues of ripeness and futility are legal issues and treat such issues as fact issues that require the reversal of summary judgment.

The state court held that there was "a genuine issue of material fact as to whether the town, by rejecting [the Mayhews'] application, intended to prevent [the Mayhews'] development of [their] property in order to impose a servitude upon the property to preserve the natural and traditional character of the land for the benefit of the public." *Mayhew v. Town of Sunnyvale*, 774 S.W.2d 284, 292 (Tex.App.-Dallas 1989, writ denied), App. 19. This "intent" fact issue was characterized by the court as "the linchpin of [the Mayhews'] claims that [they have] suffered deprivation of federal and state constitutional rights to procedural due process, substantive due process and equal protection, and a taking of [their] property without payment of just or adequate compensation." *Id.* at 293, App. 19.

The court believed the Town's intent could be ascertained through a determination of whether the Town would enter-

tain the submission of another development plan by the Mayhews.

> [I]n the present case it must ultimately be determined whether the town has left open the door for [the Mayhews] to make new application under article XV of the town's zoning ordinance or closed the door to further applications. If the door is closed, then [the Mayhews] cannot develop [their] land. A property owner need not engage in futile reapplications. [Citation omitted]. [The Mayhews] insist[] that a genuine issue of material fact exists as to whether the town has closed the door. We agree,

Id. at 289, App. 12.

The court apparently determined that if the Town would not allow the Mayhews to reapply for a less intensive yet economically viable use of their property because of the Town's "intent" to take their property without just compensation, then the case was ripe for adjudication since further applications by the Mayhews would be futile. *Id.* at 289-91, App. 12-15. According to the court, this "fact issue" precluded the granting of summary judgment for the Town.

> [W]e now discuss [the Mayhews'] evidence asserted to show that the town closed the door to a further application in order to preserve [the Mayhews'] land as a scenic natural park for the benefit of the public. We conclude that the judicial system must have this *factual circumstance* resolved before it can decide whether [the Mayhews'] property has been taken.

Id. at 290, App. 14 (emphasis added).

Federal precedent establishes, however, that the determination of ripeness, and its futility exception, are questions of law to be determined by the court, not fact issues to be

resolved by a jury. *Herrington v. County of Sonoma*, 857 F.2d 567, 568 (9th Cir. 1988), *cert. denied*, ___U.S.___ , 109 S.Ct. 1557 (1989); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453 n.4, *amended*, 830 F.2d 968 (9th Cir. 1987). The court's erroneous characterization of the ripeness and futility issues as fact questions prohibited it from upholding the summary judgment which should have been sustained because the Mayhews' taking challenge, as a matter of law, was not ripe for adjudication.

The gravamen of the Mayhews' taking argument is that the Town, by denying the Mayhews' application, has relegated the Mayhews to only those land uses allowed by the Town's Zoning Ordinance, which uses the Mayhews characterize as "blanket one-acre zoning" and not economically viable. Although it is undisputed that the Town Council voted to deny the Mayhews' application, no maintenance of "blanket one-acre zoning" by the Town was ever applied to the Mayhews.

In its final form, the Mayhews' application requested approximately 3.2 units per acre. The Town Council not only did not insist upon a one-acre limitation as a prerequisite for the plan's approval, but in fact was receptive to a plan with a proposed density of substantially more than one unit per acre but less than the 3.2 units per acre demanded by the Mayhews. A "blanket one-acre minimum lot requirement" therefore was not an appropriate density for review by the trial court in determining whether a taking had occurred.*

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*The Town Council's verbatim transcript and minutes of its January 13, 1987, meeting, at which time the Mayhews' application was denied, discloses that the members of the Town Council did not adhere to a strict one unit per acre zoning; rather, they discussed densities ranging from one unit per acre to 3.3 units per acre. The Town Council agreed that each individual councilmember should determine what density level he or she personally believed was appropriate, and thereafter the Town Council collectively would attempt to agree upon a common density level.

Unfortunately, the appropriate density figure for review has yet to be determined and the Mayhews' taking challenge therefore is not ripe for adjudication. The Mayhews submitted only one application at 3.2 units per acre, and they elected not to submit a subsequent application at a lesser density. In order for a court to determine if a regulation goes so far as to constitute a taking, the court must know the nature and extent of the development permitted under the regulation. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348-53 (1386); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 187-95 (1985); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 649-50 (1981).

To determine the appropriate ripeness analysis to be applied to the Mayhews' claims requires an identification of the type of challenge the Mayhews have brought, an "arbitrary and capricious due process claim" or a "due process takings claim." *See Eide v. Sarasota County*, 908 F.2d 716, 720 (11th Cir. 1990). An arbitrary and capricious due process claim is one which seeks, in a facial challenge, to invalidate the challenged regulation and, in an as applied challenge, to enjoin the regulation's application; such claim does not, however, seek damages for a taking through

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Councilwoman Eloise Patrick initially determined that 1,080 units on the 1,080 developable acres (one unit per acre) were acceptable, but later increased her acceptable level of density to 1,100 units. Councilman Carroll Brown determined that 2,500 units (2.3 units per acre) were acceptable. Councilman Gordon Davis determined that 2,200 units (2.0 units per acre) were acceptable. Councilman Robert Sanders determined that 2,824 units (2.6 units per acre) were acceptable. Councilman Robert Harden determined that 3,600 units (3.3 units per acre) were acceptable. The discussions of the Town Council conclusively establish that rigid adherence to one acre zoning unequivocally was not a condition for the Mayhews' planned development approval, as density levels of 2.0, 2.3, 2.6 and 3.3 units per acre were deemed acceptable by the individual councilmembers. Assuming the most restrictive scenario, a plan asking for 2 units per acre would have passed by a 4-to-1 vote.

inverse condemnation occasioned by the use of the regulation. *Id.* at 721-22, 726. A due process takings claim, on the other hand, asserts that a challenged regulation goes "too far" and destroys the value of property, thereby resulting in an invalid exercise of the police power and an award of damages for the value taken. *Id.*

In the instant case, the Mayhews seek over $15 million in damages and allege that the Town's zoning practices deny them the economically viable use of their land. Therefore, it is clear that the Mayhews have alleged a due process takings claim. The proper standard for determining the ripeness of a due process takings claim consists of two parts.

> First, the zoning decision must be finally made and applied to the property. Second, the local authority must have made all other decisions necessary for the court to determine whether the landowner has been deprived of substantially all economically beneficial value of the property. Therefore, for these claims to be ripe, the plaintiff is *required to reapply for zoning* in order to establish what extent of development will be permitted and for a court to determine whether the regulation has gone "too far."

Id. at 725 n.16 (emphasis added).

Absent any other plan submitted by the Mayhews, a range of densities greater than one unit but less than the requested 3.2 units per acre which might be acceptable to the Town can never be considered by the Town Council or the courts. A remarkably similar fact situation was encountered in *MacDonald, supra,* where property owners submitted a subdivision plan to the County Planning Commission for the development of a single-family and multi-family residential community. The County Board of Supervisors rejected the plan for various reasons, including concerns

regarding street access, lack of police protection, and inadequate sewer and water service. Upon rejection of the plan, the landowners brought suit to have the subdivision ordinance declared unconstitutional as a taking of property. *Id.*, 477 U.S. at 343-44. This Court, however, based upon the ripeness doctrine, declined to hear the case on the merits. Since the property owners had filed only one subdivision application, the rejection of that application did not eliminate the possibility that development might be authorized on the property if a less intensive project were proposed. The taking issue was not ripe for adjudication.

> It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. . . . Until a property owner has "obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property," "it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed."

Id. at 348-49 (citations omitted). This Court wrote that "[o]ur cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *Id.* at 351.

> [A]ppellant has submitted one subdivision proposal and has received the Board's response thereto. Nevertheless, appellant still has yet to receive the Board's "final, definitive position regarding how it will apply the regulations at issue to the particular land in question."

Id. (citation omitted).

The similarity between the *MacDonald* landowners and the Mayhews is striking.

> The plaintiff's claim here must fail for the same reasons the claims in *Agins* failed. Here *plaintiff applied for approval of a particular and relatively intensive residential development and the application was denied. The denial of that particular plan cannot be equated with a refusal to permit any development,* and plaintiff concedes that the property is zoned for residential purposes in the County general plan and zoning ordinance. Land use planning is not an all-or-nothing proposition. A governmental entity is not required to permit a landowner to develop property to [the] full extent he might desire or be charged with an unconstitutional taking of the property. Here, as in *Agins,* the *refusal of the defendants to permit the intensive development desired by the landowner does not preclude less intensive, but still valuable development.* Accordingly, the complaint fails to state a cause of action.

Id. at 347 (emphasis added).

The Tenth Circuit, in a factually similar case, recently applied the ripeness doctrine in *Landmark Land Co. of Oklahoma, Inc. v. Buchanan,* 874 F.2d 717 (10th Cir. 1989). In *Buchanan,* a land developer filed suit against various city officials, a county commissioner and Air Force officers, alleging a taking of property without just compensation and a denial of due process and equal protection in connection with the city's failure to issue certain building permits. Plaintiff, a developer attempting to develop a neighborhood shopping center, successfully had its property rezoned to accommodate the shopping center, and filed numerous documents concerning planned development of the property, including revised site plans, applications for grading permits

and a request to divide lots, all of which were granted by the city. Plaintiff also granted the county an easement over part of its property and expended substantial resources in grading and ditch development. *Id.* at 718-19.

Even though plaintiff had spent a significant amount of time and money on its development plan, as did the Mayhews in the instant case, the city, in conjunction with certain Air Force officials, denied plaintiff building permits for its property and proclaimed that no building permits would be issued pending the city's consideration of an ordinance. The ordinance under consideration would establish a zoning plan for plaintiff's property to accommodate a local Air Force base, but would not allow plaintiff's proposed shopping center. *Id.* at 719. As a result of the city's failure to issue the building permits to plaintiff, plaintiff lost sales of portions of its property and was unable to proceed with the shopping center development. Plaintiff asserted that the city's actions constituted, *inter alia*, a taking of its property. *Id.* The court, in applying *Williamson County, supra*, and *MacDonald, supra*, determined that plaintiff's taking challenge was not yet ripe for adjudication, stating that

> [Plaintiff] has alleged no efforts to explore the possibility of alternative development plans with the City. The process of clarifying what level of development [the City] will permit on this particular piece of land is in a comparatively nascent stage. [Plaintiff's] claim will not be ripe until it is in a position to allege not only that its initial permit applications were denied, but also that it has made some effort to pursue compromise with the City that would allow some level of development.

Buchanan, 874 F.2d at 721.

Plaintiff, in an effort to overcome the ripeness doctrine, alleged "that any further dealings with the City would be

futile." *Id.* The court, in rejecting plaintiff's futility argument, noted that the futility exception "is not applicable unless it is 'clear beyond peradventure that excessive delay in such a final determination [would cause] the present destruction of the property's beneficial use.' " *Id. (quoting Norco Construction, Inc. v. King County,* 801 F.2d 1143, 1145 (9th Cir. 1986)). The *Buchanan* court also noted that "the best support for a claim of futility is completion of the steps mandated by *Williamson County* and *Yolo County:* unsuccessful pursuit of either a variance *or a proposal for less intense development." Id.* at 722 (emphasis added).

In the instant case, since the Town's Zoning Ordinance did not contain a variance procedure for the Mayhews to utilize after the denial of their application, it was incumbent upon them to pursue "a proposal for less intense development." *Id.* It is also important to note that nowhere in the 242 paragraphs of their Original Petition did they allege that a reapplication of their planned development would be futile.

In short, the Town's Zoning Ordinance, through its planned development provisions, may provide for other valuable development with an average density of less than the Mayhews' requested 3.2 units per acre, though significantly greater than one unit per acre. For this reason, the state trial court did not err in granting summary judgment for the Town based upon a determination that the Mayhews' taking challenges were not ripe for review or adjudication, and the state appellate courts erred in holding ripeness and futility to be fact issues, which finding precluded summary judgment.

II.

A state court should not focus its taking analysis solely on a municipality's decision to deny a requested zoning use; rather it also should consider the remaining uses left to the zoning applicant under the municipality's zoning ordinance in determining that a taking of property may have occurred.

Assuming *arguendo* that the Mayhews' claims were ripe for adjudication, and that the Town's one-acre zoning provisions were applied to the Mayhews, the court erred in not upholding the granting of summary judgment because the court improperly focused its analysis upon the Town's decision to deny the Mayhews' application without considering the remaining uses available to the Mayhews by the Town's Zoning Ordinance. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), this Court set out the test to determine if a land use regulation amounts to a taking.

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, [citation omitted], or denies an owner economically viable use of his land [citation omitted].

Id. at 260. In applying this standard, the Court concluded that a one-acre zoning ordinance in *Agins* substantially advanced legitimate governmental goals of discouraging the "premature and unnecessary conversion of open-space land to urban uses," and protected the residents of Tiburon "from the ill effects of urbanization," both of which "long have been recognized as legitimate" governmental interests. *Id.* at 261. The Court also held that no taking had occurred as a result of the one-acre zoning ordinance in question because economically viable use of the land had not been denied.

> Although the ordinances limit development, they neither prevent the best use of appellants' land, [citation omitted], nor extinguish a fundamental attribute of ownership [citation omitted]. . . . Thus, it cannot be said that the impact of general land-use regulations has denied appellants the "justice and fairness" guaranteed by the Fifth and Fourteenth Amendments.

Id. at 262-63.

In the present case, there can be no doubt that the conservation and preservation of open space, and the desire of the Town to protect its residents from the "ill effects of urbanization" are legitimate state interests that are substantially advanced by the Town's one-acre zoning provisions. *See id.* at 261; *Pace Resources, Inc. v. Shrewsbury Township,* 808 F.2d 1023, 1030 (3d Cir.), *cert. denied,* 482 U.S. 906 (1987) ("[c]ontrolling the rate and character of community growth is the very objective of land use planning"). One-acre zoning neither prevents the best use of the Mayhews' land nor does it extinguish a fundamental attribute of ownership. *See Agins,* 477 U.S. at 262. The purportedly best use of the land, *i.e.,* residential, still may be accomplished under one-acre zoning, and additionally, no rights of ownership in the land have been extinguished. It is the second part of the two-part test in *Agins* that the state appellate courts failed to properly address — whether the Town's Zoning Ordinance denied the Mayhews all economically viable use of their land? *Id.* at 260.

The Fifth Amendment's prohibition against taking without compensation does not guarantee the most profitable use of property, *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 592 (1962), and a diminution in value, standing alone, does not establish a taking. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 131 (1978). Taking issues

must be resolved by focusing not on the uses regulations deny, but rather on the uses that regulations permit. *Id.* For example, in *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915), this Court upheld a restriction that devalued property by approximately 90%, from $800,000 to $60,000. Similarly, the Court sustained a zoning regulation in its seminal zoning case, *Euclid v. Ambler Realty Corp.*, 272 U.S. 365, 384 (1926), even though the restriction reduced the value of the property by 75%. *See also Pace Resources*, 808 F.2d at 1031 (reduction in value from $495,600 to $52,000 held not a taking); *Pompa Construction Corp. v. City of Saratoga Springs*, 706 F.2d 418, 420 n.2 (2d Cir. 1983) (use restriction which devalued property by approximately 77% was not a taking).

In each of the above-cited cases, it was held that no taking had occurred, in spite of the significant reduction in the value of property caused by the land use regulations, because the courts properly focused their analysis on whether the regulations permitted some economically viable use of the property, and not whether the regulations denied the property owners the best use of their property or a reasonable return on their investments. *See also Park Avenue Tower Associates v. City of New York*, 746 F.2d 135, 140 (2d Cir. 1984), *cert. denied sub nom. 40 Eastco v. City of New York*, 470 U.S. 1087 (1985).

The Town's decision to deny the Mayhews' application, standing alone, cannot be a taking unless the remaining uses of the Mayhews' property available under the Town's Zoning Ordinance are not economically viable. The state court's analysis, however, fails to address the crucial issue of whether any economically viable uses remained to the Mayhews, even if "blanket one-acre zoning" was the only zoning available to them.

The Mayhews asserted in the state courts that there was no evidence in the record of any economically viable use for

their property. The Mayhews, however, clearly ignored their own property appraisals conducted both before and after the Town's denial of their application. An appraisal dated August 9, 1985, valued the Mayhews' property at $8,335.00 per acre. The Mayhews' land also was appraised on July 21, 1987, six months after the denial of the application, at a price of $1,000.00 to $6,800.00 per acre. The Mayhews' own appraisals establish that an economically viable use of their property remained after the Town Council denied their application. As this Court has held, a mere diminution in land value and the destruction of profit potential are not necessarily sufficient to establish the loss of all "economically viable use."

> [L]oss of future profits — unaccompanied by any physical property restriction — provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.

Andrus v. Allard, 444 U.S. 51, 66 (1979). *See Williamson County*, 473 U.S. at 191 n.12; *Dean Tarry Corp. v. Friedlander*, 650 F.Supp. 1544, 1550 (S.D.N.Y.), *aff'd*, 826 F.2d 210 (2d Cir. 1987); *Sign Supplies of Texas, Inc. v. McConn*, 517 F.Supp. 778, 782 (S.D. Tex. 1980).

Additionally, even assuming that the Mayhews are relegated to developing their property under one-acre zoning, it is axiomatic that the Town never "took" anything from the Mayhews. Since the just compensation clause applies only to the taking of "property," the Mayhews must have a property right which was taken from them by virtue of the Town's decision to deny their planned development

application. This Court has characterized these property rights as "reasonable, distinct, investment-backed expectations." *See Penn Central*, 438 U.S. at 124-25. *See also Furey v. City of Sacramento*, 592 F.Supp. 463 (E.D. Cal. 1984), *aff'd*, 780 F.2d 1448 (9th Cir. 1986). In order for the Town's actions to be tantamount to a taking, the Mayhews' desire for profit, *i.e.*, their "investment-backed expectations," must be reasonable. *Penn Central*, 438 U.S. at 124-25. Investment-backed expectations are reasonable only if they take into account the power of the state to regulate in the public interest. *Pace Resources*, 808 F.2d at 1033.

Since the Mayhews had no entitlement or vested right in any anticipated zoning change, no "reasonable investment-backed expectations" existed in regard to anyone who purchased his or her property after one-acre zoning went into effect in 1973. *See Furey*, 592 F.Supp. at 469-70; *Conroy v. Village of Lisle*, 716 F.Supp. 1104, 1107 (N.D. Ill. 1989) (holding that property owners did not suffer a taking when they were denied a zoning variance by the village, where the owners bought the property with the zoning ordinance already in effect, "[b]ecause the constitutional guaranty of just compensation extends only to 'property,' under the case law a 'taking' always involves the *new* imposition of a previously nonexistent restriction, whether via a zoning enactment or some other means") (emphasis in original).

Sunnyvale Properties, Ltd., did not own any of the subject property when the Town enacted one-acre zoning in 1973. The Mayhews purchased four of the seven tracts comprising the subject property after one-acre zoning was enacted in 1973. It is clear that this use of zoning — buying property at a low price with restrictive zoning in place and attempting to have the restrictive zoning removed in order to sell the property at a profit — cannot, as a matter of law, vest the

developer with reasonable investment-backed expectations that must be redressed under the just compensation clause. *See Furey*, 592 F.2d at 469-70; *Pace Resources*, 808 F.2d at 1034.

In short, since the Mayhews' expectation of overturning the Town's zoning patterns was unreasonable, the submission that the Mayhews may establish a taking simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development quite simply is untenable. *See Penn Central*, 438 U.S. at 130. Moreover, the Town's actions do not interfere with the Mayhews' reasonable, distinct, investment-backed expectations and therefore the diminution in value of the Mayhews' property is insufficient to support a finding that the Town's Zoning Ordinance and land use decisions have effected a taking of the Mayhews' property. Thus the state court erred in overruling the summary judgment granted on behalf of the Town on its taking claim.

III.

A procedural due process challenge to a municipal zoning decision is precluded by a determination that the decision is a legislative act.

The state court held that the actions of the individual Town Councilmembers in denying the Mayhews' application for planned development approval constituted a legislative act.

> Thus, we reach the question of whether the individual defendants acted in a legislative capacity when they voted to deny [the Mayhews'] application for planned development under article XV of the zoning ordinance. When a zoning body acts on an individual request, it is motivated by legislative concerns — its role is to decide the best course for the community and not necessarily

> to adjudicate the rights of contending parties. [Citation omitted.] We conclude, therefore, that the individual defendants acted in a legislative capacity.

Mayhew, 774 S.W.2d at 298, App. 30. As a result of this determination, the state court was precluded from finding that the Mayhews may have been deprived of procedural due process.

"It is an established constitutional principle that procedural due process attaches *only* to administrative or adjudicatory action by the state, and not to legislative action." *Developments in the Law — Zoning,* 91 HARV. L. REV. 1427, 1508 (1978) (emphasis added). This principle was first recognized in *Bi-Metallic Investment Co. v. State Board of Equalization,* 239 U.S. 441 (1915). In *Bi-Metallic Investment,* the plaintiff landowner complained that it was not afforded an opportunity to be heard prior to the entry of an order by the Denver tax assessor increasing the valuation of all taxable property in Denver by 40%. *Id.* at 443-44. The Court, assuming that no one was given an opportunity to be heard, wrote that the question is "whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned. . . . " *Id.* at 445. The Court rejected the plaintiff's contentions.

> The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of their ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. . . . [N]o one would suggest that the 14th Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the

> body intrusted by the state Constitution with the power. . . . There must be a limit to individual argument in such matters if government is to go on.

Id. See also Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 167 (1951) ("[W]hen decisions of administrative officials in execution of legislation turn exclusively on considerations similar to those on which the legislative body could itself have acted summarily, notice and hearing may not be commanded by the Constitution"). Consequently, the procedural protections of due process do not extend to all deprivations of otherwise protected property interests. Deprivations which occur as a result of a legislative act are not subject to the procedural requirements of due process. *See Jackson Court Condominiums, Inc. v. City of New Orleans*, 665 F.Supp. 1235, 1246 (E.D. La. 1987) and cases cited therein.

The policy considerations underpinning this constitutional precept are clear.

> Due process is limited to nonlegislative actions in part because of practical concerns of administrability. A constitutional right of procedural due process for every person affected by legislation would entail procedures so cumbersome as to make government action impossible. More importantly, due process need not attach to legislative acts because the large number of people affected by most legislative acts normally ensures that government will not act unreasonably towards the populace. Legislators will attempt to represent the views of their constituents accurately, and, if they do not do so, the electoral process provides recourse.

Developments, supra, at 1508-09. *See also* Subrin and Dykstra, *Notice and the Right to be Heard: The Significance of Old Friends*, 9 HARV. C.R. & C.L. REV. 449, 460 (1974);

Rendleman, *The New Due Process: Rights and Remedies,* 63 KY. L.J. 531, 559-61 (1975).

It is a fundamental concept of constitutional law that the procedural protections of due process do not extend to the legislative acts of governmental units. Consequently, the Town Council's legislative act of denying the Mayhews' application for planned development, as a matter of law, could not have resulted in a denial of their procedural due process rights.

IV.

No factual predicate is necessary prior to determining the facial constitutionality of a municipal ordinance.

The state courts, in remanding the Mayhews' federal constitutional claims, incorrectly concluded that the question of intent is relevant to a facial challenge of the Town's Zoning Ordinance. *Mayhew,* 774 S.W.2d at 292-93, App. 18-19. "A 'facial challenge' means a claim that the law is 'invalid in toto — and therefore incapable of any valid application.' " *Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489, 494 n.5 (1982). Where a decision turns on the meaning of words in a statute or regulation, a legal question is presented for the court to decide. *Bingham's Trust v. Commissioner of Internal Revenue,* 325 U.S. 365, 371 (1945). Therefore, when the question presented is only a legal one requiring examination of municipal regulations to determine their constitutionality, the issue is appropriate for summary judgment proceedings. *International Society for Krishna Consciousness, Inc. v. Rochford,* 425 F.Supp. 734, 738 (N.D. Ill. 1977). The state courts' determination that the Mayhews' facial constitutional challenges to the Town's zoning ordinance are predicated upon disputed factual issues is clearly erroneous.

CONCLUSION

The implications of this lawsuit are far-reaching and will affect municipalities across the nation. By injecting an elusive element of intent into judicial inquiries of municipal zoning decisions, the state court has sharply restricted the deference due those decisions. As noted by the Fifth Circuit Court of Appeals, "the difference between an inquiry into whether there was any possible rational basis for legislation and an inquiry into the actual basis of legislation is significant. A court's assumption of the power to decide between competing legislative proposals or to require the state to prove the validity of its choice is quickly the right to change the legislative process itself." *Shelton v. City of College Station*, 780 F.2d 475, 481 (5th Cir.) (en banc), *cert. denied*, 477 U.S. 905 (1986). Moreover, if the decision of the state court is allowed to stand, municipalities will have two options when litigating zoning decisions of a constitutional dimension — expend thousands (or in this case hundreds of thousands) of dollars to define and then defend municipal intent behind every zoning decision or remove the case immediately to federal court and invoke the federal standard of review. Clearly, for municipalities, there is no real choice. This lawsuit provides the Court with an opportunity to clarify the constitutional standards of review for municipal zoning decisions and accord municipalities the deference due their legislative acts.

It is respectfully submitted that, for the reasons presented above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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INDEX TO APPENDIX

Cause No. 87-3074-K

CHARLES MAYHEW, SR., CHARLES MAYHEW, JR., THE ESTATE OF AUDREY MAYHEW, and SUNNYVALE PROPERTIES, LTD.,	§	IN THE DISTRICT COURT
Plaintiffs,	§	DALLAS
VS.	§	COUNTY, TEXAS
THE TOWN OF SUNNYVALE, ELOISE PATRICK, ROBERT SANDERS, GORDON DAVIS and CARROLL BROWN, as individuals	§	192ND JUDICIAL
Defendants.	§	DISTRICT

ORDER

The Court, having considered Defendants' Motion for Summary Judgment and Supporting Brief, Plaintiffs' Response to Defendants' Motion for Summary Judgment, Defendants' Reply to Plaintiffs' Response to Defendants' Motion for Summary Judgment, and all exhibits and attachments thereto, in addition to all related materials filed by the parties and friends of the court addressing the issues raised in Defendants' Motion for Summary Judgment, and having considered the applicable authorities and arguments of counsel, finds that Defendants' Motion for Summary Judgment is well taken in all respects. It is, therefore,

ORDERED that Defendants' Motion for Summary Judgment be granted in all respects and that Plaintiffs' causes of action against all Defendants be dismissed in their entirety.

SIGNED this 22 day of April, 1988.

/s/ Merrill Hartman
JUDGE

Cause No. 87-3074-K

CHARLES MAYHEW, SR., CHARLES MAYHEW, JR., THE ESTATE OF AUDREY MAYHEW, and SUNNYVALE PROPERTIES, LTD.,	§	IN THE DISTRICT COURT
Plaintiffs,	§	DALLAS
VS.	§	COUNTY, TEXAS
THE TOWN OF SUNNYVALE, ELOISE PATRICK, ROBERT SANDERS, GORDON DAVIS and CARROLL BROWN, as individuals	§	192ND JUDICIAL
Defendants.	§	DISTRICT

JUDGMENT

On April 22, 1988, came on for consideration Defendants' Motion for Summary Judgment and Supporting Brief, Plaintiffs' Response to Defendants' Motion for Summary Judgment, Defendants' Reply to Plaintiffs' Response to Defendants' Motion for Sumary Judgment, and all exhibits and attachments thereto, pursuant to Rule 166a of the Texas Rules of Civil Procedure. Counsel for all parties appeared and presented extensive arguments relative to said Motion. Having thoroughly considered all such evidence and arguments of counsel, and it appearing to the Court that there is no genuine issue as to any material fact and that Defendants' Motion for Summary Judgment and Supporting Brief is granted in its entirety.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendants' Motion for Summary Judgment and Supporting Brief is well taken and is granted in all respects; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiffs' Original Petition be dismissed in its entirety and that Plaintiffs take nothing by their suit and that Plaintiffs' Original Petition be dismissed with prejudice to the refiling thereof.

SIGNED this 22 day of April, 1988.

/s/ Merrill Hartman
JUDGE

Charles MAYHEW, Sr., Charles Mayhew, Jr., The Estate of Audrey Mayhew, and Sunnyvale Properties, Ltd., Appellants,

v.

The TOWN OF SUNNYVALE, Eloise Patrick, Robert Sanders, Gordon Davis, and Carroll Brown, as Individuals, Appellees.

No. 05-88-00734-CV.
Court of Appeals of Texas,
Dallas.

June 9, 1989.

Rehearing Denied Aug. 9, 1989.

Robert D. Barbee, and Douglas A. Cawley, Johnson & Swanson, Dallas, Sarah C. Swanson, Larry Niemann, Niemann & Niemann, Austin, Charles L. Siemon, Andrew Stansell, Siemon, Larsen & Purdy, Chicago, Ill., for appellants.

N. Alex Bickley, Bickley & Associates, Robert F. Brown, Kenneth C. Dippel, Terrence S. Welch, Kent S. Hofmeister, Hutchison, Boyle, Brooks & Fisher, Dallas, for appellees.

Susan Mead, Thomas H. Keen, Dallas, for amicus curiae.

Before WHITHAM, LAGARDE and KINKEADE, JJ.

WHITHAM, Justice.

Denied a proposed planned development sought under the zoning ordinances of the appellee, The Town of Sunnyvale, the appellants, Charles Mayhew, Sr., Charles Mayhew, Jr., the Estate of Audrey Mayhew, and Sunnyvale Properties, Ltd. (Mayhew), brought this action against The Town of Sunnyvale and the additional individual appellees, Eloise Patrick, Robert Sanders, Gordon Davis, and Carroll Brown (the town), challenging the town's zoning ordinances on ten counts. Mayhew appeals from a summary judgment in favor

of the town. Mayhew filed no motion for summary judgment. We conclude that the town's alleged violations of the Texas Zoning Enabling Act were cured by validation statutes. Insofar as the trial court's judgment denies Mayhew any relief for the town's violation of the Texas Zoning Enabling Act, we affirm the trial court's judgment. We conclude that the individual defendant-appellees, Eloise Patrick, Robert Sanders, Gordon Davis, and Carroll Brown are entitled to absolute immunity. Insofar as the trial court's judgment denies Mayhew any relief against the appellees, Eloise Patrick, Robert Sanders, Gordon Davis, and Carroll Brown, we affirm the trial court's judgment. We conclude that the trial court did not err in denying Mayhew's first motion to compel testimony from town councilman Robert Sanders. We conclude, therefore, that we need not reverse the trial court's judgment because of error in denying Mayhew's first motion to compel testimony from town councilman Robert Sanders. We conclude that the town, as defendant-movant for summary judgment has failed to establish as a matter of law that there is no genuine issue of material fact as to one or more of the essential elements of Mayhew's multiple causes of action grounded on federal and state constitutional claims. Insofar as the trial court's judgment denies Mayhew any relief against the Town of Sunnyvale on any of Mayhew's federal and state constitutional claims, we reverse the trial court's judgment and remand the cause for trial on the merits of Mayhew's federal and state constitutional claims. Accordingly, we affirm in part and reverse in part and remand the cause to the trial court for trial on the merits of Mayhew's federal and state constitutional claims.

The Genuine Issues of Material Fact Inquiry

The present case offers numerous complex and difficult questions for resolution. We do not attempt to discuss all of the asserted genuine issues of material fact briefed by the

parties. However, there exists at least one genuine issue of material fact that we consider to be at the heart of this controversy. That fact issue is central to a principal inquiry of whether the town at this point has done anything to give rise to any of Mayhew's federal and state constitutional claims. As trial on the merits unfolds, we are confident that the trial court and the parties will better come to grips with any and all other disputed fact issues necessary to be determined by a fact finder. Certainly, this case illustrates the difficulty presented in attempting by way of summary judgment to dispose of complex and difficult lawsuits involving federal and state constitutional claims.

We begin by repeating well-known rules governing the summary judgment practice. The function of a summary judgment is not to deprive a litigant of his right to a full hearing on the merits of any real issue of fact, but to eliminate patently unmeritorious claims and untenable defenses. *Gulbenkian v. Penn*, 151 Tex. 412, 415-16, 252 S.W.2d 929, 931 (1952). The standards for reviewing a motion for summary judgment are well established. As mandated by the Supreme Court of Texas, they are as follows:

> 1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.
>
> 2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.
>
> 3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Nixon v. Mr. Property Management, 690 S.W.2d 546, 548-49 (Tex.1985). It is not the purpose of the summary judgment rule to provide either a trial by deposition or a trial by affidavit, but rather to provide a method of summarily

terminating a case when it clearly appears that only a question of law is involved and that there is no genuine issue of fact. *Gaines v. Hamman*, 163 Tex. 618, 626, 358 S.W.2d 557, 563 (1962). Moreover, when the defendant is the movant, as in the present case, we must be alert to additional rules controlling the summary judgment practice. The question on appeal, as well as in the trial court, is not whether the summary judgment proof raises fact issues with reference to the essential elements of a plaintiff's claim or cause of action, but is whether the summary judgment proof establishes as a matter of law that there is no genuine issue of facts as to one or more of the essential elements of the plaintiff's cause of action. *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex.1970). Therefore, a defendant is entitled to a summary judgment if he establishes, as a matter of law, that at least one element of plaintiff's cause of action does not exist. *See Rosas v. Buddies Food Store*, 518 S.W.2d 534, 537 (Tex. 1975). Furthermore, on a governmental body's motion for summary judgment the presumption of validity accorded governmental decisions cannot be used to affirmatively sustain the movant's burden. The presumptions and burden of proof for an ordinary or conventional trial are immaterial to the burden that a movant for summary judgment must bear. *Missouri-Kansas-Texas R.R. v. City of Dallas*, 623 S.W.2d 296, 298 (Tex.1981). The extraordinary burden resting upon a party challenging an action of a city council to show that the action was illegal and void is a burden for trial on the merits, not on a proceeding for summary judgment sought by the city. *See Bliss v. City of Fort Worth*, 288 S.W.2d 558, 563 (Tex.Civ.App.-Fort Worth 1956, writ ref'd n.r.e.).

With these principles in mind, we look to the summary-judgment proof for the background to the present controversy. Mayhew is the owner of approximately 1,200 acres of vacant land in the town. The property is regularly shaped and from a geotechnical perspective is suitable for suburban development. The town is a suburb of the City of Dallas

situated between the cities of Garland and Mesquite, approximately twelve miles east of the central business district of the City of Dallas, and is accessible by Interstate 30 to the north and by Interstate 20 to the south. The town contains approximately 10,941 acres of land, of which approximately 8,190 is vacant. There are about 675 existing residences in the town and the majority of those residences are developed on lots of less than one acre. In 1965, the town adopted a comprehensive plan and zoning ordinance that provided for the future growth and development of the town. The 1965 plan and zoning ordinance provided for a variety of residential development types including multifamily residences and single family lot sizes as small as 12,000 square feet. In 1973, in response to a problem with septic tank failures in small lot subdivisions, the town amended its zoning ordinance to require a minimum lot size of one acre. Subsequently, sanitary sewer was made available to lands within the town, including Mayhew's property, obviating the need for larger lots to accommodate drainage fields. However, the one acre minimum lot requirement was not repealed. Nor was there any effort to amend the town's comprehensive plan to delete the multifamily forms of residential development and single family housing at densities of up to 3.5 dwelling units per acre from the town's official plan. As a result, all of Mayhew's property, although zoned in three separate zoning districts, is limited to single family residences with a minimum lot size requirement of one acre, even though the town's comprehensive plan provides for a variety of residential densities for Mayhew's property. In the twelve years since the one acre lot requirement had been in place, only 160 residences have been developed on one acre lots. More than 8,000 acres of vacant land in the town is subject to the town's one acre requirement.

In 1985, Mayhew inquired as to whether the town would consider a planned development under article XV of the town's zoning ordinance, which purported to allow more

intensive residential development for well-planned developments. Article XV provides in part:

> I. INTENT and PURPOSE. The intent of the Planned Development District (PD) is to provide a flexible, alternative zoning procedure to encourage imagination and innovative design for the unified development of large tracts of land, within overall use regulations set forth in this ordinance, the general land use plan, the thoroughfare plan, and the goals and policies of the development of the Town. The PD District is designed to allow the planned association of different land use such as residential developments of mixed housing, estates, golf courses, green belts, equestrian trails and centers, or office parks, or any appropriate combination of these uses which may be planned, developed or operated as a unified development.

Town officials, including members of the town council, encouraged Mayhew to pursue a high quality planned development, especially one with a golf course. After more than a year of cooperative work with the town, including extensive input from the town's consulting land planner and the expenditure of more than $500,000 for studies and analyses, Mayhew filed an application on July 3, 1986, for development approval for what was to be known as the Mayhew Ranch Planned Development (the "application"). The application for planned development and supporting materials proposed a range of development intensities with various types of housing units arranged around more than 300 acres of common or open space including a golf course. As was the practice of the town, the application for the Mayhew Ranch Planned Development was referred to the town's consulting planner for review. The consulting planner concluded that the application met the requirements for a planned development under article XV of the town's zoning ordinance. The consulting planner, in fact, included the proposed planned

development in the updated comprehensive plan he produced for the town because he believed it was a superior plan for the use of the property in terms of sound and responsible planning. Mayhew met or exceeded each of the enumerated requirements for a planned development. Nevertheless, in the face of "political" opposition from residents of the town (most of whom live on lots of less than one acre) the town council denied the application for development approval on January 13, 1987. In the mayor's words because "we just couldn't get it together." The reasons for opposition to the planned development were two-fold: first, the residents like having the Mayhew property as "free" open space; and second, the possibility that "undersirable persons" might move into the town if the Mayhew Ranch Planned Development were approved.

In multiple points of error, Mayhew contends, *inter alia*, that the town violated his federal and state constitutional rights to procedural due process, substantive due process, and equal protection, and that the town's decision effected a taking of his property without payment of just or adequate compensation. Mayhew grounds these claims on the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 19 of the Texas Constitution (procedural and substantive due process); the Fourteenth Amendment and article I, section 3 of the Texas Constitution (equal protection); The Fifth and Fourteenth Amendments and article I, section 17 of the Texas Constitution (taking without payment of just or adequate compensation); and Texas Revised Civil Statutes articles 1011b and 1011c (now recodified as sections 211.004, 211.005, and 211.013 in the Texas Local Government Code). The claims were brought pursuant to sections 1983 and 1988 of title 42 of the United States Code and sections 37.003 and 65.011 of the Texas Civil Practice and Remedies Code. Central to Mayhew's contentions is the argument that public outcry or demands caused the town to take his property and not the

public health, safety, and welfare. In this connection, we recognize a basic concept of private property ownership. While property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking. *We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415-16, 43 S.Ct. 158, 160, 67 L.Ed 322 (1922) (emphasis added).

Mayhew does not challenge the town's right to zone. Instead, Mayhew contends that the town's zoning activities have "stonewalled" him to the point that he can do nothing with his property that will satisfy the town, thus leaving him holding legal title to 1200 acres of unimproved land, taken and used, however, by the residents of the town as desired open space necessary to afford the residents a rustic environment in which to live.[1] In the language of the United States Supreme Court, Mayhew insists that it will be a very curious and unsatisfactory result if it shall be held that if the government refrains from the absolute conversion of real property for the public use it can destroy the property's value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject the property to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use. *See Pumpelly v. Green Bay & Miss. Canal Co.,*

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[1]Amicus curiae, The Lupshire Company, tells us that it is the owner of approximately 1,042 acres of land located in the town and that it is also an unsuccessful applicant for a zoning change in the town, having received a final denial from the town council on April 10, 1989. Lupshire also tells us that like Mayhew, the Lupshire request involved a tract of land over 1,000 acres, large enough to be self-sustaining and self-contained, was for residential uses on lots less than one acre, and was involved in the zoning process for more than a year, at a cost of several hundred thousand dollars.

80 U.S. (13 Wall.) 166, 177-80, 20 L.Ed. 557 (1872). We agree.

The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. *Mahon,* 260 U.S. at 415, 43 S.Ct. at 160, per Mr. Justice Holmes. The present case focuses upon whether the natural tendency of human nature to which Mr. Justice Holmes refers remains alive and well. Thus, in the present case it must ultimately be determined whether the town has left open the door for Mayhew to make new application under article XV of the town's zoning ordinance or closed the door to further applications. If the door is closed, then Mayhew cannot develop his land. A property owner need not engage in futile reapplications. *See MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 106 S.Ct. 2561, 2568 n. 8, 91 L.Ed.2d 285 (1986). Mayhew insists that a genuine issue of material fact exists as to whether the town has closed the door. We agree.

In doing so, we find instructive the Supreme Court's decision in *City of Austin v. Teague,* 570 S.W.2d 389 (Tex.1978). In *Teague,* local residents appeared before the city council and urged the council to stop further development of Teague's land and asked the council to take steps to have the site preserved as a scenic easement bordering the southern approach to downtown. Teague applied to the city for a permit required to proceed with preparation of the land for development. The city denied the application. So it went with Teague's second and third applications. Teague sued

the city for damages for inverse condemnation of his land.[2] *Teague,* 570 S.W.2d at 390-91. From the Court of Civil Appeals' opinion in *Teague* we know that it is a fact question whether a municipality refuses to allow development with the intention to prevent all development of a tract and preserve it as an easement for the benefit of the public. We quote the opinion of the Court of Civil Appeals:

> Trial was to a jury which found: Issue 1. Defendant thru [sic] its course of conduct between January 1973 and June 26, 1975, refused to allow plaintiffs to alter the portions of Harpers Branch and the Ramble which cross plaintiffs' tract of 8.51 acres *with the intention* to prevent all development of that tract and preserve it as a scenic easement for the benefit of the public.

City of Austin v. Teague, 556 S.W.2d 400, 401 (Tex.Civ.App.-Waco 1977), *rev'd on other grounds,* 570 S.W.2d 389 (Tex.1978) (emphasis added). In this connection, we observe that the issue of intent is not susceptible to being readily controverted and is best left to the determination of the trier of fact. *See Futerfas v. Park Towers,* 707 S.W.2d 149, 157 (Tex.App-Dallas 1986, writ ref'd n.r.e.). Returning to the Supreme Court's opinion in *Teague,* we note that the Supreme Court concluded that the landowners demonstrated to both the jury and the trial court that the City of Austin, by rejecting the third application for a Waterway Development Permit, sought to impose a servitude upon the property to preserve "the natural and traditional character of the land and waterway" — that is, the city wanted to use plaintiffs' land as a scenic easement on the southern approach to the City of Austin. *Teague,* 570 S.W.2d at 394. In reaching this conclusion, the Supreme Court reasoned that at the time the city denied the third application for a

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[2] Inverse condemnation, i.e., uncompensated taking of property. *Murmur Corp. v. Board of Adjustment of Dallas,* 718 S.W.2d 790, 809 (Tex.App.-Dallas 1986, writ ref'd n.r.e.) (Whitham, J., concurring).

permit, Teague lost all use of his land; the city by indirection acquired the scenic easement at no cost which it had recommended that the State Highway Department acquire by purchase. In doing so it also singled out Teague to bear all of the cost for the community benefit without distributing any cost among the members of the community. *Teague*, 570 S.W.2d at 394.

With *Teague* in mind, we next consider Mayhew's summary judgment evidence said to raise a genuine issue of material fact as to whether the town refused to allow development with the intention to prevent all development of Mayhew's land and preserve it as open space to afford the town's residents a rustic environment in which to live. In short, we now discuss Mayhew's evidence asserted to show that the town closed the door to a further application in order to preserve Mayhew's land as a scenic natural park for the benefit of the public. We conclude that the judicial system must have this factual circumstance resolved before it can decide whether Mayhew's property has been taken. *See Yolo County*, 106 S.Ct. at 2567-69. The town would have us view the summary judgment proof as showing that Mayhew walked through the door of the town hall on January 13, 1987, presented the town with an all or nothing proposition, and then proceeded to bring this action when his application was denied. We conclude that the summary judgment proof tells us more.

Mayhew's application was considered for a period of more than six months. Mayhew had initiated discussions with the town in regard to the proposed development more than a year prior to the town's decision, meeting with town officials on more than twenty occasions *prior* to submitting the application. Mayhew worked closely with representatives of the town, including the town planner, in coming up with an acceptable design proposal, spending over one-half of one million dollars in providing information and studies to provide information showing that the proposed development

satisfied the requirements of the town's planned development ordinance and would be an asset to the town. In November of 1986, about half way through this process, the town decided to revise its comprehensive plan by substantially decreasing the amount of density that would be permitted in the town, all while Mayhew's application was pending. Subsequently, Mayhew's representatives met with town officials, including the town attorney, the town manager, council member Brown, and council member Sanders, to discuss the proposed development. At that meeting, Mayhew agreed to scale down the application substantially from the 5,025 units originally sought to 3,600 dwelling units and to abandon the apartments because of the town's "concerns" over the inclusion of apartments and other forms of low and moderate cost housing in the proposed development. In the end, Mayhew acceded to the demands of the town officials. But when the time came for the town council to vote on the application, the town council balked, and considered and then rejected an entire range of development proposals with densities between 1.0 and 2.93 dwelling units per acre. Indeed, the record shows that the town council considered and rejected countless other alternatives and permutations of the development proposals presented by Mayhew. Thus, in the face of "political" opposition from residents of the town, the town council denied the application for development approval on January 13, 1987. In the mayor's words, because "we just couldn't get it together."

In the event that the summary judgment proof can be said to raise genuine issues of material fact, the town advances the "debatable or issuable doctrine." The town argues that the doctrine "stands for the proposition that a proponent of a zoning ordinance or land use decision is entitled to summary judgment as to the validity of the ordinance or decision where conditions either conclusively support the passage of the ordinance or land use decision, or make the passage of the ordinance or land use decision *issuable or*

debatable." (Emphasis added). The "debatable or issuable" language is said to have been used by the Texas Supreme Court in *Baccus v. City of Dallas,* 454 S.W.2d 391, 392 (Tex. 1970), relied upon by the town. The Supreme Court agreed with our holding that, to prevail in a conventional trial on the merits, the burden is on a contestant to show that no conclusive or even controversial facts or conditions exist which offer support for action of a city's governing body in amending a zoning ordinance. *Baccus,* 454 S.W.2d at 392. A contestant has the same burden when he seeks a summary judgment invalidating an ordinance. However, that is not the rule for determining whether the proponents of such an ordinance are entitled to a summary judgment sustaining its validity. *Baccus,* 454 S.W.2d at 392. In moving for a summary judgment, proponents have the burden of establishing affirmatively by summary judgment proofs that conditions either conclusively support passage of the ordinance or make the action *debatable or issuable.* Only thus may the proponents establish validity of the ordinance as a matter of law as is required by Rule 166-A(c), of the Texas Rules of Civil Procedure. *Baccus,* 454 S.W.2d at 392. The Supreme Court then went on to describe summary judgment proof necessary to establish that the city's action was debatable or issuable. The evidence before the council raised issues over which reasonable men could differ. *Baccus,* 454 S.W.2d at 392.

We do not read *Baccus* to hold that, if reasonable men could differ as to the intent of a municipality in refusing to allow land development, no genuine issues of material fact exist on motion for summary judgment. We do not read *Baccus* to so hold for three reasons. First, we note that whether the town can take Mayhew's property without paying for it is not "debatable and issuable." From what has been said above, inverse condemnation is not permitted. Therefore, there is nothing over which reasonable men can differ sitting as town council. Second, we reason that if the

"debatable or issuable doctrine" was applicable in a case of inverse condemnation, the Supreme Court would have told us so in *Teague*. The Supreme Court did not. Instead, the Supreme Court treated the municipality's intent to be a question for the fact finder. Third, the Supreme Court tells us the limits of the "debatable and issuable doctrine" in summary judgment cases involving land use decisions. *See City of Univ. Park v. Benners*, 485 S.W.2d 773 (Tex. 1973), also relied upon by the town. In both *Baccus* and *Benners*, both parties filed motions for summary judgment. *Benners* is instructive. As to the city's motion for summary judgment, the rule for determining whether the proponents of a zoning ordinance are entitled to a summary judgment sustaining its validity is different from that of a contestant of the ordinance. Proponents are under the burden of establishing by summary judgment proof that conditions either conclusively support passage of the ordinance or make that action debatable or issuable. *Benners*, 485 S.W.2d at 781. The Supreme Court then indicates that "debatable or issuable" applies in situations in which cross-motions are made. The Supreme Court elaborates. "Our view is that the conditions shown by the summary judgment evidence establishes that, at the least, the legislative action of the governing body of the City in enacting the ordinances was issuable. Respondent does not contend for a remand for the development of further facts, no doubt in recognition that the summary judgment record presents the salient facts of the controversy." *Benners*, 485 S.W.2d at 781. Therefore, facts are not debatable or issuable if both parties are standing on the summary judgment record as providing the necessary facts of the controversy. As noted, the present case is not one in which cross-motions were filed. Mayhew filed no motion for summary judgment. Indeed, in the third case relied upon by the town as mentioning the "debatable or issuable doctrine," there was only the city's motion for summary judgment. *See Albert v. City of Addison*, 566 S.W.2d 298 (Tex. 1978). In *Albert*, the Supreme Court declined to

apply the doctrine. "The City argues that the judgment of the Court of Civil Appeals is nevertheless sustainable because even if the proper burden of proof rule is applied, it has established its right thereto as a matter of law. We disagree." *Albert*, 566 S.W.2d at 299. "The summary judgment proofs of the City do not meet the requirements of *Bliss v. City of Fort Worth*, 288 S.W.2d 558 (Tex.Civ.App.-Fort Worth 1956, writ ref'd n.r.e), in that they fail to show what matters were considered by the City Council at the meeting in which it took the action complained of here." *Albert*, 566 S.W.2d at 299. At this point, we repeat our above citation to *Bliss*. The extraordinary burden resting upon a party challenging an action of a city council to show that the action was illegal and void is a burden for trial on the merits, not on a proceeding for summary judgment sought by the city. *See Bliss*, 288 S.W.2d at 563. Consequently, we conclude that the "debatable or issuable doctrine" has no application in the disposition we make of Mayhew's appeal of summary judgment in favor of the town. We emphasize that such disposition is based on Mayhew's contention of a "taking" asserted to be inverse condemnation and the existence of a genuine issue of material fact as to the town's intention. With the "debatable or issuable doctrine" behind us, we return to the genuine issues of material fact inquiry on the summary judgment record before us. In this connection, we are mindful that merely because the facts are undisputed does not always eliminate the right to a fact finding. If reasonable minds can draw different inferences or conclusions from undisputed facts, a fact issue is presented. *Commercial Standard Ins. Co. v. Davis*, 134 Tex. 487, 137 S.W.2d 1, 2 (1940).

On motion for summary judgment, the movant-town has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Moreover, in deciding whether there is a disputed material fact issue precluding summary judgment, we must

treat evidence favorable to Mayhew as true and we must indulge every reasonable inference in favor of Mayhew and resolve any doubts in Mayhew's favor. *Nixon*, 690 S.W.2d at 548-49. Applying these rules, we conclude that the summary judgment proof establishes a genuine issue of material fact as to whether the town, by rejecting Mayhew's application, intended to prevent Mayhew's development of his property in order to impose a servitude upon the property to preserve the natural and traditional character of the land for the benefit of the public. *See Teague*, 570 S.W.2d at 394. Although other fact issues may exist as to one or more of Mayhew's claims, this "intent" fact is the linchpin of Mayhew's claims that he has suffered deprivation of federal and state constitutional rights to procedural due process, substantive due process and equal protection, and a taking of his property without payment of just or adequate compensation. We conclude, therefore, that the town, as defendant-movant for summary judgment, has failed to establish as a matter of law that there is no genuine issue of material fact as to one or more of the essential elements of Mayhew's multiple federal and state constitutional claims. Consequently, we conclude further that the trial court erred in granting the town's motion for summary judgment as to Mayhew's federal and state constitutional claims. We sustain Mayhew's points of error one through five and seven through nine. In doing so, we express no opinion on the merits of any of Mayhew's federal and state constitutional claims. The disposition of the merits of those claims awaits trial on the merits. Moreover, our conclusion that a genuine issue of material fact exists is not to be read as holding that no other fact issues exist or as suggesting the wording of any question submitted to the jury. The existence or not of other fact issues and the wording of any question or questions submitted to the jury, if there be a jury, are in the first instance to be resolved by the trial court.

Matters Asserted to Support the Trail Court's Judgment in Whole or in Part

We now turn to Mayhew's points of error addressing defensive issues raised by the town on its motion for summary judgment. We must decide the town's defensive issues because the trial court granted the town's motion for summary judgment in its entirety without explanation.

In its sixth point of error, Mayhew contends that the trial court erred in granting summary judgment (1) because the Texas Zoning Enabling Act (Texas Revised Civil Statutes article 1011a, *et seq.*, now recodified in the Texas Local Government Code sections 211.001, et seq.) applies to the town as a matter of law, (2) because the town's zoning ordinance was not made in accordance with a comprehensive plan (3) because Mayhew has standing to challenge the validity of the ordinance and (4) because violations of the Act are not cured by validation acts. Mayhew alleged that the town's zoning ordinance is void because the ordinance failed to comply with the requirements of the Texas Zoning Enabling Act. The town moved for summary judgment, contending that the Texas Zoning Enabling Act did not apply to them, that the town did not have to adopt the required plan, that Mayhew was without standing to challenge the town's failure to comply with the Texas Zoning Enabling Act, and that it did not matter that the town violated the Texas Zoning Enabling Act because validation statutes cured these defects. We conclude that none of the town's first three contentions have merit and that the trial court erred as a matter of law if it determined that any of them were "well taken." We conclude further, however, that the town's fourth argument as to validation statutes has merit.

Application of the Texas Zoning Enabling Act to the town. The town first argues that because the town is a general law city, the Texas Zoning Enabling Act does not apply to the town, citing *City of Brookside v. Comeau*, 633 S.W.2d 790

(Tex. 1982), *cert. denied* 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1986). A plain reading of *City of Brookside,* however, shows that the case actually stands for the proposition that when a general law city *that has not previously adopted a comprehensive plan* seeks to adopt an ordinance which would have the *effect* of regulating the use of land as distinguished from "zoning," it may do so under its general police power. *City of Brookside,* 633 S.W.2d at 793 & n. 4 (mobile home regulation). We conclude that *City of Brookside* does not hold that a city that undertakes to impose "zoning" regulations is free to ignore the dictates of the Texas Zoning Enabling Act. The courts of this State have held ordinances and amendments to ordinances invalid where the express, mandatory provisions of our zoning statute have not been complied with. *Bolton v. Sparks,* 362 S.W.2d 946, 950 (Tex. 1962). It is undisputed that the town has a comprehensive plan, that it has had such a plan since 1965, that the regulations at issue are "zoning" regulations, and indeed, that the town's zoning ordinance expressly provides that it was *made in accordance with a comprehensive zoning plan.* Hence, we do not read *City of Brookside* to mean that the town is free to ignore the requirements mandated by the Texas Zoning Enabling Act when it undertakes zoning. It is undisputed that the town is a general law city and it is well settled that under the Texas Constitution, general law cities possess only those powers chartered by general law. *See* TEX. CONST. art. XI, § 4 (cities with populations of 5,000 and less). We conclude that articles 1011b and 1011c of the Texas Revised Civil Statutes (now recodified as sections 211.004, 211.005, and 211.013 of the Local Government Code) apply to general law cities, and therefore, the town, a general law city, must comply with the statutory requirements of these statutes. A general law city must look to general law for its authority to exercise municipal powers. Texas law is settled that general law cities derive their authority to exercise governmental powers from general law itself. *See, e.g., Hope v. City of Laguna Vista,*

721 S.W.2d 463, 463-64 (Tex.Civ.App.-Corpus Christi 1986, writ ref'd n.r.e.) (general law city possesses only those powers and privileges conferred by law). Next, it is also settled that the Texas Zoning Enabling Act, a general law, applies to general law cities as a matter of law. *See, e.g., Coffee City v. Thompson*, 535 S.W.2d 758, 763-67 (Tex.Civ.App.-Tyler 1976, writ ref'd n.r.e.) (invalidating the zoning ordinance of the Town of Coffee City, a general law city with a population of less than 1,000, in its entirety for failure to comply with the requirements of article 1011 et seq.); *Massengale v. City of Copperas Cove*, 520 S.W.2d 824, 828 (Tex.Civ.App.-Waco 1975, writ ref'd n.r.e.) (non-home rule city must look to article 1011 *et seq.* for authority to enact zoning regulation); *City of San Antonio v. Lanier*, 542 S.W.2d 232, 234 (Tex.Civ.App.-San Antonio 1976, writ ref'd n.r.e.) (Texas municipalities derive their power to zone exclusively from the enabling statutes, article 1011a, et seq.). Thus the trial court erred as a matter of law if it concluded that the town may zone without consideration of the Texas Zoning Enabling Act.

Ordinance made in accordance with a comprehensive plan. Texas statutes require that zoning be "in accordance with a comprehensive plan" (*see* article 1011c, TEX.REV.CIV. STAT.ANN.) and have contained this requirement since 1927. The zoning enabling acts of most other jurisdictions also contain this requirement, which is derived from the Standard State Zoning Enabling Act (U.S. Dep't Commerce, 1924). *See* Haar, *In Accordance With A Comprehensive Plan*, 68 HARV.L.REV. 1154, 1158 (1955). Mayhew alleged that the town's zoning ordinance was not made in accordance with a comprehensive plan and that the ordinance itself is not a comprehensive plan. The town argues in response that article 1011c does not mean what it says, that the zoning map which is a part of its ordinance constitutes a comprehensive plan, and that the map and ordinance were "dispositive" of whether there was an existing plan. The

thrust of Mayhew's challenge (and article 1011c), however, is not whether there was "an existing plan" but whether the zoning ordinance that was adopted was *made in accordance with* a comprehensive plan.

Mayhew recognizes that Texas courts, in responding to challenges that zoning is invalid because of a local government's failure to adopt a comprehensive plan, have found comprehensive, coherent, and logical zoning ordinances themselves sufficient to satisfy the *"in accordance with"* requirement. *See, e.g., Benners,* 485 S.W.2d 773, *passim* (geographic comprehensiveness); *Coffee City v. Thompson,* 535 S.W.2d 758 (Tex.Civ.App.-Tyler 1976, writ ref'd n.r.e.) (substantive comprehensiveness). But that is not the case where a municipality has a separately adopted comprehensive plan. In such a case, the law is settled that the adopted comprehensive plan must, by statutory mandate, serve as the basis for subsequent zoning amendments:

> *A comprehensive zoning ordinance is law that binds the municipal legislative body itself.* Art. 1011c. The legislative body does not, on each rezoning hearing, redetermine as an original matter, the city's policy of comprehensive planning. The law demands that the approved zoning plan should be respected. . . . *The duty to obey the existing law forbids municipal actions that disregard not only the pre-established zoning ordinance but also the long-range master plans and maps that have been adopted by ordinance.*

City of Pharr v. Tippitt, 616 S.W.2d 173, 176-77 (Tex.1981) (emphasis added) (citations omitted). It is apparent that the town's ordinance fails to meet the requirements of article 1011c in both respects because, on the record in this cause, it is clear that the town *already had* a separate comprehensive plan which it chose to ignore in adopting its 1983 zoning ordinance.

The facts of the present case are that the town adopted a comprehensive plan in 1965 and that the town's zoning

ordinance was amended in 1973 to require a minimum lot size of one acre for all single family detached dwellings without regard to, and creating a pattern that is patently inconsistent with the 1965 plan. Perhaps the most egregious example of this inconsistency lies in the fact that while the 1965 plan allocated a substantial portion of the town's area to single family uses on lots with an average size of 12,000 square feet (3.6 dwelling units per acre), the 1983 zoning ordinance requires that such uses be on lots that are not smaller than 43,560 square feet (1 acre). And while the 1965 plan allocated approximately 93 acres for multiple family use, the 1983 ordinance does not permit the construction of such housing in any part of the town. Further, the record shows that the 1965 plan was still in effect when the town adopted its zoning ordinance in 1983. The record further demonstrates that the 1983 zoning ordinance was not made in accordance with, and in fact obviously and directly conflicted with, the town's adopted comprehensive plan. Indeed, the town's own planner testified in his deposition that the zoning ordinance was *not* made in accordance with a comprehensive plan. We conclude that the 1973 amendment requiring a minimum lot size of one acre violated the requirement that zoning be made in accordance with a comprehensive plan. Nor can there be any doubt that the zoning applied to Mayhew's property is irrational and unsupported by a logical or coherent comprehensive plan. Indeed, uncontroverted evidence adduced by the town shows that in 1986, when the town council recognized that the sound planning of the 1965 plan and the comprehensive plan report prepared by its professional consultant conflicted with the town's predilection for one acre zoning, the town directed its consultant to remove all substance from the so-called plan that was ultimately adopted in November 1986. Shortly thereafter, the draft comprehensive plan was substantially amended at the direction of the town council to remove all references to density. This kind of after-the-fact justification of pre-judged ideas is the antithesis of comprehensive

planning and fundamental fairness. Indeed, we decline to approve the concept that pre-ordained results dictated by political hue and cry can be sound planning. Hence, the trial court erred as a matter of law if it concluded that the town's zoning ordinance was made in accordance with a comprehensive plan.

Mayhew's standing to challenge violation of article 1011b. Mayhew alleged that the town's zoning ordinance violates article 1011b in that the ordinance is not uniform for each class or kind of building in each district. The town raises the argument that Mayhew does not have standing to challenge the ordinance. We disagree. The Declaratory Judgment Act authorizes any person whose rights are affected by a municipal ordinance to seek a declaration of the "rights, status, and other legal relations whether or not further relief is or could be claimed." TEX.CIV.PRAC. & REM.CODE ANN. §§ 37.003(a) & 37.004(a) (Vernon 1986). It has long been recognized that everyone has a fundamental right to use their property, subject only to the lawful exercise of the police power. *See, e.g., Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113, 1121, 31 L.Ed.2d 424 (1972). In the absence of the town's zoning ordinance, Mayhew would have the right to make such use of his property as he saw fit, provided that the use did not operate to the harm of others. We conclude that the use of Mayhew's property has been and continues to be affected by the challenged zoning provisions and that he is entitled *not* to have the reasonable use of his property interfered with by a regulation failing to comply with state law. We conclude further, therefore, that Mayhew has standing to seek a declaration of whether the town's zoning ordinance is in compliance with article 1011b. Hence, it follows that the trial court erred as a matter of law if it concluded that Mayhew did not have standing to challenge the town's alleged violation of article 1011b.

Validation statutes and violations of the Texas Zoning Enabling Act. We begin by noting Mayhew's posture on appeal concerning this issue. Mayhew tells us in his brief that "[t]he Original Petition alleged that the [town's zoning ordinance] is void because the ordinance failed to comply with the requirements of the Texas Zoning Enabling Act." Hence, compliance with state statute is the issue; not the statute's constitutionality. Although Mayhew insists that the town's challenged zoning ordinance was not made in accordance with a comprehensive plan as required by the Texas Zoning Enabling Act, we must now decide if subsequent validation statutes deny Mayhew his cause of action based on failure to comply with the state statute. We conclude that the challenged zoning ordinance is not subject to attack on the grounds of the town's failure to comply with the Texas Zoning Enabling Act. We reach this conclusion because since the town's challenged action, the legislature has enacted validating statutes. The current validating statute became effective May 20, 1987. TEX.REV.CIV. STAT.ANN. art. 974d-36 (Vernon Supp.1989). The validating statutes apply to a town operating under general law. Article 974d-36, section 1. Article 974d-36 provides in section 3(b) that all governmental proceedings performed by the governing bodies of all such cities and towns and their officers since their incorporation are validated as of the date of such proceedings. Mayhew argues that a validation statute may not be used to cure substantive defects such as those alleged in the present case. We disagree. Validation acts are remedial and are to be liberally construed. *Murmur Corp.* at 793. They apply to amendatory zoning ordinances. *Murmur,* 718 S.W.2d at 793. Although validation statutes may not cure constitutional defects, they may cure defects that do not render the ordinance unconstitutional. *Murmur,* 718 S.W.2d at 793. As noted, Mayhew asserts no constitutional defect. Because the irregularity challenged by Mayhew did not affect a constitutional right, we conclude it was the intention of the legislature to cure this type of defect and

that the alleged violation of the Texas Zoning Enabling Act was validated. *See Murmur*, 718 S.W.2d at 793. Hence, it follows that the trial court did not err as a matter of law if it concluded that the town's alleged violations of the Texas Zoning Enabling Act were cured by validation statutes. Insofar as the trial court's judgment denies Mayhew any relief for the town's violation of the Texas Zoning Enabling Act, we overrule Mayhew's sixth point of error and affirm the trial court's judgment in part. We sustain the remainder of Mayhew's sixth point of error. Our disposition of Mayhew's sixth point of error is not to be read as affirming the trial court's judgment as to Mayhew's claims for violations of federal and state constitutional rights to procedural due process, substantive due process, and equal protection, and as to Mayhew's claim that the town's decision effected a taking of his property without payment of just or adequate compensation.

In his tenth point of error, Mayhew contends that the trial court erred in granting summary judgment for the town because the doctrine of governmental function does not bar Mayhew's claims. Mayhew's claims can be divided into three categories: (1) federal constitutional claims, (2) state constitutional claims, and (3) state statutory claims. In its brief the town tells us that "[the town does] not challenge [Mayhew's] assertion that the doctrine of governmental function does not bar federal and state constitutional claims, but that doctrine does bar [Mayhew's state statutory claims] and the trial court correctly dismissed those claims." We have earlier found that Mayhew has no state statutory claims. We read the town's brief to tell us that it agrees that the doctrine of governmental function does not bar Mayhew's remaining federal and state constitutional claims. Hence, it follows that the trial court erred if it concluded that the doctrine of governmental function barred Mayhew's federal and state constitutional claims. We sustain Mayhew's tenth point of error insofar as it applies to Mayhew's federal and state constitutional claims.

In his eleventh point of error, Mayhew contends that the trial court erred in granting summary judgment for the town because Mayhew's claims lie outside the scope of sovereign immunity and are not subject to notice of claim procedures. The town's motion for summary judgment was also based in part on the assertion that Mayhew was barred from recovering damages under state law because Mayhew allegedly failed to file a notice of claim. We have earlier found that Mayhew has no state statutory claims. In its brief, the town tells us that it "has never contended that a notice of claim must be filed relative to alleged federal law violation; however, [Mayhew] must file a notice of claim with [the town] for [Mayhew's] alleged state constitutional violations." We read the town's brief to tell us that it agrees that Mayhew need not file a notice of claim relative to its federal constitutional claims. Therefore, the sole issue before us is whether Mayhew must file a notice of claim as to his state constitutional claims. In *San Antonio River Authority v. Garrett Brothers*, 528 S.W.2d 266 (Tex.Civ.App.-San Antonio 1975, writ ref'd n.r.e.), the plaintiff sought damages for inverse condemnation under article I, section 17 of the Texas Constitution. *Garrett*, 528 S.W.2d at 272. The charter provision requiring the giving of a notice of claim of injury is not applicable to a case of this nature. *Garrett*, 528 S.W.2d at 274. Hence, it follows that the trial court erred if it concluded that Mayhew was required to file a notice of claim as to its federal and state constitutional claims. We sustain Mayhew's eleventh point of error insofar as it applies to Mayhew's federal and state constitutional claims.

In his twelfth point of error, Mayhew contends that the trial court erred in granting summary judgment for lack of jurisdiction because Mayhew has complied with the requirements of the Declaratory Judgment Act as a matter of law. The town's motion for summary judgment was also based in part on the assertion that the trial court was without jurisdiction to render declaratory or injunctive relief because

Mayhew did not comply with the requirements of the Declaratory Judgment Act in regard to serving a copy of the Original Petition on the Texas Attorney General. The Texas Declaratory Judgment Act provides that if a municipal ordinance is alleged to be unconstitutional, "the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard." TEX.CIV.PRAC. & REM.CODE ANN. § 37.006(b) (Vernon 1986). It is undisputed that the Texas Attorney General was served with a copy of the proceeding on or about February 2, 1988, and that an appearance was filed on behalf of the State of Texas on or about March 4, 1988, prior to the hearing on the town's motion. We conclude that nothing in the Act requires that service be had within a particular period of time. The appearance filed on behalf of the State unambiguously shows that the Attorney General has declined to participate in this action because the constitutionality or validity of a state statute has not been challenged. Although the town argued that service was insufficient because an unreasonable amount of time had elapsed before notice was given, it is clear that courts have taken a different view of this matter and have held that "Texas requires only substantial compliance with section 11 [now 37.006(b)] of the Declaratory Judgments Act." *City of Garland v. Louton*, 691 S.W.2d 603, 605 (Tex.1985). Hence, it follows that the trial court erred if it concluded that it lacked jurisdiction because Mayhew failed to comply with the requirements of the Declaratory Judgment Act in regard to serving a copy of the original petition on the Texas Attorney General. We sustain Mayhew's twelfth point of error.

In his thirteenth point of error, Mayhew contends that the trial court erred in granting summary judgment for the individual defendants because genuine issues of material fact exist and the individual defendants were not entitled to judgment as a matter of law. Mayhew alleged that the individual defendants violated Mayhew's federal and state

constitutional rights in denying his application for planned development. The thrust of Mayhew's contention is that the individual defendants knew that Mayhew's application complied with each of the requirements of article XV of the zoning ordinance but nevertheless voted to deny for reasons other than those established by article XV. The individual defendants seek to avoid judicial review of their actions by claiming that they acted in a legislative capacity in applying the previously established standards of article XV to Mayhew's application and that they were therefore entitled to absolute immunity. In the alternative, the defendants urged that they were entitled to qualified immunity because they acted in the scope of their immunity with the good faith belief that their actions were lawful. Mayhew tells us in his brief that "[f]ederal law provides an absolute immunity from liability for a specified class of government officials engaging in a narrowly drawn class of activities, and the act of legislation has long been recognized as an activity warranting such immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S.Ct. 2727, 2732, 73 L.Ed.2d 396 (1980)." Thus, we reach the question of whether the individual defendants acted in a legislative capacity when they voted to deny Mayhew's application for planned development under article XV of the zoning ordinance. When a zoning body acts on an individual request, it is motivated by legislative concerns — its role is to decide the best course for the community and not necessarily to adjudicate the rights of contending parties. *Mahone v. Addicks Util. Dist.*, 836 F.2d 921, 934 (5th Cir.1988). We conclude, therefore, that the individual defendants acted in a legislative capacity. Therefore, the individual defendants are entitled to absolute immunity. Consequently, the individual defendants were entitled to judgment in their favor as a matter of law. Hence, it follows that the trial court did not err if it concluded that the individual defendants were entitled to judgment in their favor as a matter of law. We overrule Mayhew's thirteenth point of error and affirm the trial court's judgment as to Eloise

Patrick, Robert Sanders, Gordon Davis, and Carroll Brown in their individual capacities.

A Discovery Issue

In his fourteenth point of error, Mayhew contends that the trial court erred in denying his first motion to compel testimony from town councilman Robert Sanders. The dispute centers on Sander's argument that he should not be made to testify concerning legislative action. We agree. Judicial review of legislative action should be restricted to examination of the language of the law in question and official legislative records. *Sosa v. City of Corpus Christi*, 739 S.W.2d 397, 405 (Tex.App. — Corpus Christi 1987, no writ). Individual legislators may not be questioned to determine the evidence upon which they relied or their reasons for voting a particular way. *Sosa*, 739 S.W.2d at 405. These principles are consistent with the basic doctrine that the subjective knowledge, motive, or mental process of an individual legislator is irrelevant to a determination of the validity of a legislative act because the legislative act expresses the *collective will* of the legislative body. *Sosa*, 739 S.W.2d at 405. Furthermore, public policy dictates that individual legislators be incompetent witnesses regarding a law enacted by the legislature as a body. Legislators' hands must not be bound by a possibility of being haled into court to testify any time a legislative action is questioned. *Sosa*, 739 S.W.2d at 405. We conclude, therefore, that the trial court did not err in denying Mayhew's first motion to compel testimony from town councilman Robert Sanders. We overrule Mayhew's fourteenth point of error.

For the above reasons, we affirm the trial court's judgment in part and we reverse the trial court's judgment in part and remand the cause to the trial court for trial on the merits of Mayhew's federal and state constitutional claims.

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

CHARLES MAYHEW, SR., CHARLES MAYHEW, JR., THE ESTATE OF AUDREY MAYHEW, AND SUNNYVALE PROPERTIES, LTD.,

APPELLANTS,

v. NO. 05-88-00734-CV

THE TOWN OF SUNNYVALE, ELOISE PATRICK, ROBERT SANDERS, GORDON DAVIS, AND CARROLL BROWN, as Individuals,

APPELLEES.

BEFORE JUSTICES WHITHAM, LAGARDE, AND KINKEADE

ORDER

It is ORDERED that the motion for rehearing filed on June 30, 1989, by appellants, Charles Mayhew, Sr., Charles Mayhew, Jr., The Estate of Audrey Mayhew, and Sunnyvale Properties, Ltd., is hereby OVERRULED.

The July 28, 1989 motion of appellees Town of Sunnyvale, Eloise Patrick, Robert Sanders, Gordon Davis and Carroll Brown for leave to file their amended motion for rehearing is GRANTED. Apellees' [sic] amended motion for rehearing, tendered to this Court on July 28, 1989, is ORDERED filed as of that date. Appellees' July 7, 1989, original motion for rehearing is DEEMED superseded.

It is also ORDERED that the amended motion for rehearing filed on July 28, 1989, by appellees The Town of Sunnyvale, Eloise Patrick, Robert Sanders, Gordon Davis and Carroll Brown, as Individuals, is hereby OVERRULED.

AUGUST 8, 1989

/s/ Warren Whitham

WARREN WHITHAM
JUSTICE

COURT OF APPEALS
FIFTH DISTRICT OF TEXAS
AT DALLAS

CHARLES MAYHEW, SR., CHARLES MAYHEW, JR., THE ESTATE OF AUDREY MAYHEW, AND SUNNYVALE PROPERTIES, LTD.,

APPELLANTS,

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THE TOWN OF SUNNYVALE, ELOISE PATRICK, ROBERT SANDERS, GORDON DAVIS, AND CARROLL BROWN, as Individuals,

APPELLEES.

JUDGMENT

In accordance with this Court's opinion of this date, the judgment of the trial court is AFFIRMED except insofar as it denies appellants, Charles Mayhew, Sr., Charles Mayhew, Jr., The Estate of Audrey Mayhew, and Sunnyvale Properties, Ltd., any relief against appellee the Town of Sunnyvale on any of appellants' federal and state constitutional claims.

Insofar as the judgment of the trial court denies any relief to appellants, Charles Mayhew, Sr., Charles Mayhew, Jr., The Estate of Audrey Mayhew, and Sunnyvale Properties, Ltd., against appellee the Town of Sunnyvale on any of the state and federal constitutional claims of appellants, Charles Mayhew, Sr., Charles Mayhew, Jr., The Estate of Audrey Mayhew, and Sunnyvale Properties, Ltd., the judgment of the trial court is REVERSED and the cause is REMANDED to the trial court for trial on the merits of the

federal and state constitutional claims of appellants, Charles Mayhew, Sr., Charles Mayhew, Jr., The Estate of Audrey Mayhew, and Sunnyvale Properties, Ltd.

It is also ORDERED that appellants, Charles Mayhew, Sr., Charles Mayhew, Jr., The Estate of Audrey Mayhew, and Sunnyvale Properties, Ltd., recover their costs of this appeal from appellee the Town of Sunnyvale. The clerk of the district court is directed to release the full amount of the cash deposit in lieu of cost bond to appellants, Charles Mayhew, Sr., Charles Mayhew, Jr., The Estate of Audrey Mayhew, and Sunnyvale Properties, Ltd.

JUNE 9, 1989

/s/ Warren Whitham

WARREN WHITHAM
JUSTICE

88-00734.F

THE SUPREME COURT OF TEXAS
P.O. Box 12248
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Austin, Texas 78711
John T. Adams, Clerk

September 12, 1990

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RE: Case No. C-9021
Style: TOWN OF SUNNYVALE, TEXAS ET AL. v. CHARLES MAYHEW, SR., ET AL.

Dear Counsel:

Both applications for writ of error in the above referenced case were this day denied with the notation, Writ Denied.

Sincerely,
John T. Adams, Clerk

by: /s/ Blanca E. Morin
Blanca Morin, Deputy

ARTICLE XV

"PD" PLANNED DEVELOPMENT DISTRICT

That section XV of the zoning code (No. 59) be replaced in its entirety by the following:

I. INTENT AND PURPOSE. The intent of the Planned Development District (PD) is to provide a flexible, alternative zoning procedure to encourage imagination and innovative design for the unified development of large tracts of land within overall use regulations set forth in this ordinance, the general land use plan, the thoroughfare plan, and the goals and policies for development of Town.

The PD District is designed to allow the planned development association of different land uses such as residential developments of mixed housing, estates, golf courses, green belts, equestrian trails and centers, or office parks, or any appropriate combination of these uses which may be planned, developed, or operated as a unified development. Furthermore, it is the general purpose of the PD district classification to:

A. Encourage enhancement and preservation of lands which are unique or of outstanding scenic, environmental, cultural or historical significance;

B. Provide an alternative for more efficient use of land, resulting in smaller networks of utilities, safer networks of streets, promoting greater opportunities for public and private open space, and resulting in lower construction and maintenance costs to the general public;

C. Ensure the application of professional planning and design techniques to achieve overall coordinated developments, eliminating the negative impacts of and piecemeal development which could result from the rigid adherence to the zoning classifications and standards found elsewhere in this ordinance;

D. Facilitate determination of the development's anticipated impact on the tax base, economy, population change, public facilities, and the environment, in order to enable a proper assessment of costs to be shared by the general public and those to be borne by the developer.

II. ELIGIBILITY. The foregoing general purposes and the comprehensive plan elements, along with such standards and performance criteria provided in this Ordinance shall guide in the determination of eligibility for PD application.

III. DEVELOPMENT SITE PLAN.

A. Ownership. All land included for purposes of development within a PD district shall be owned by or be under the control of the applicant for such zoning designation, whether the applicant be an individual, partnership or corporation. The applicants shall present proof of the unified control of the area in the proposed PD district.

B. Legal Description of Site. This description shall be prepared by a land surveyor. The legal description shall be accompanied by a map at a scale suitable for reproduction for advertising for public hearing.

C. Site Conditions Map. This map or series of maps shall be drawn to an acceptable scale and shall indicate:

1. Title of the planned unit development and name of the developer.

2. Scale, date, north arrow, and general location map showing relationship of the site to such external facilities as highway, shopping areas, cultural complexes.

3. Boundaries of the subject property, all existing streets, buildings, water courses, easements, section lines, and other important physical features within the proposed project. Other information on physical features affecting the proposed project may be required.

4. Existing topograph with a contour interval of not less than one foot, or spot grades where the relief is limited.

5. The location and size (as appropriate) of all existing drainage, water, sewer, and other utility provisions.

6. Information about existing vegetative cover and general soil types as appropriate to the proposed project.

7. The location and function of all other existing public facilities which would serve the site such as schools, parks and fire stations. Notation of this information is a scaled map is acceptable.

D. Concept Plan. This plan shall be prepared at the same scale as the above site conditions maps and shall indicate:

1. Sketch plan for pedestrians and vehicular circulation showing the general locations and right-of-ways widths and the general design capacity of the system as well as access points to the major thoroughfare systems. A diagrammatic flow chart demonstrating the pattern of vehicular traffic movement to, within, and through the planned development shall be included as a supplement to this plan.

2. A general plan for the use of all lands within the proposed PD. Such plans shall indicate the location, function and extent of all components or units of the plan, including low, medium, and high density residential areas, (including the

proposed density for each category); open space provisions such as golf courses, parks, passive or scenic areas, community serving recreation or leisure time facilities; and areas for such public or quasi-public institutional uses such as schools, churches and libraries.

3. A statement indicating what proposed arrangements are made with the appropriate agencies for the provision of needed utilities to and within the planned development, including, if appropriate, water supply, treatment and distribution where on site treatment is proposed; sewage systems, storm drainage collection and disposal where on site treatment is proposed.

E. A supportive report shall be prepared in conjunction with the above material and shall include:

1. A general description of the proposed development including:

a. The total acreage involved in the project.

b. The number of acres devoted to the various categories of land use shown on the site development plan, along with the percentage of total acreage presented by each category of use and component of development plus an itemized list of uses proposed for each of the components which shall be the range of uses permitted for that section of the planned development.

c. The number and type of dwelling units involved for overall site and for its components; dwelling unit per acre calculations, along with population projections for each.

d. A description of the projected service areas for nonresidential uses (neighborhood, community or regional) along with the projected

population data necessary to support these facilities.

e. The establishment of minimum design standards which shall govern the site development such as lot shape and size, internal streets and pedestrian ways, open space provisions, off-street parking demands, visual screens, general buffer and landscaped areas.

2. A statement and/or map indicating which streets or roads (and predestrian ways as appropriate) are proposed for public ownership and maintenance and whether approval will be sought for private roads, if any, within the development.

3. A statement and/or map on drainage which generally shows existing drainage conditions, wet weather areas, areas of frequent flooding, points of discharge from the project, and anticipated quantities of water generated from the development. Where conditions dictate, a statement on the proposed method of discharge of run-off within and from the site shall be furnished.

4. A statement which shall indicate the proposed method of governing the use, maintenance and continued protection of the open space and community serving facilities.

F. Development Schedule. The development site plan shall be accompanied by a development schedule indicating the approximate date on which construction is expected to begin and the rate of anticipated development to completion. A development schedule, if adopted and approved by the Town Council shall become part of the development plans and shall be adhered to by the owner, developer, and his successors in interest. Upon the recommendation of the Planning and Zoning Commission and for good cause shown by the owner and developer, the Town Council may extend the development schedule or

adopt such new development schedule as may be supported by facts and circumstances of the case.

IV. PROCEDURES FOR PD DEVELOPMENT SITE PLAN APPROVAL. All applications for PD development shall be processed in the following manner:

A. Preapplication Conference. Prior to submitting an application for approval of a planned development, the applicant or his representative shall confer with the Town Administrator and the Planning and Zoning Commission. The applicant is encouraged to submit a tentative land use sketch and review and to obtain information on any projected plans, programs or other matters that may affect the proposed development. This information should include:

1. The proper relationship between the proposed development and surrounding uses, and the effect of the plan upon the comprehensive plan of the City.

2. The adequacy of existing and proposed streets, utilities, and other public facilities and services within the proposed planned development.

3. The character, design and appropriation of the proposed land uses and their adequacy to encourage desirable living conditions, to provide separations and screening between uses where desirable, and to preserve the natural amenities of streams, wooded areas, and similar natural features.

4. The adequacy of open space and recreations areas existing and proposed, to serve the needs of the development.

5. The adequacy of the land area and of the surrounding areas to accommodate future expansion, if needed.

B. Application. After the preapplication conference, a formal application for a planned development district may be made to the Planning and Zoning Commission in the same manner as an application for zoning change is made. Application for approval of a planned development district shall be processed according to the procedures specified in other sections of the Zoning Ordinance hereof and a development site plan and related data shall be submitted therewith for approval in accordance with the requirements of this Section. Every application shall be accompanied by a filing fee as established by the Town Council.

V. USE REGULATIONS. Deviation from the regulations established in this ordinance applicable to particular uses may be permitted when the developer demonstrates that adequate provisions have been made in the planned development to protect contiguous land uses, that pedestrian and vehicular traffic circulation systems are safe and efficient, that the development will progress in orderly phases, and that the public health, safety and general welfare will be protected. For the PD district, use regulations applicable to a particular use shall be the same as if such use were situated in a district in which such uses are otherwise permitted in this ordinance, unless other restrictions and regulations are approved as a part of the development site plan and the PD district ordinance amendment.

(2)

No. 90-941

In The

Supreme Court of the United States

October Term, 1990

THE TOWN OF SUNNYVALE, TEXAS,

Petitioner,

vs.

CHARLES MAYHEW, SR., et al.,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Texas

BRIEF IN OPPOSITION

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Texas

BRIEF IN OPPOSITION

Respondents respectfully pray that this Court deny the Petition for a Writ of Certiorari to the Supreme Court of the State of Texas.

JURISDICTION

The Petitioner's jurisdictional statement invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). However, as the Respondents show in Section I of their Reasons for Denying the Writ, jurisdiction does not properly lie with this Court because the decision from which

the Town appeals is not a "final judgment" within the meaning of § 1257(a).

SUMMARY OF ARGUMENT

The writ should be denied because this Court is without jurisdiction under 28 U.S.C. § 1257(a) to review this case, and the Petitioner, the Town of Sunnyvale, Texas ("the Town"), has failed to show that this case presents a substantial federal question meriting the attention of this Court.

Jurisdiction does not properly lie with this Court because the decision below of the Court of Appeals of Texas is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a). The Court of Appeals of Texas merely affirmed in part the trial court's granting of the Town's defensive motion for summary judgment, reversed in part the trial court's judgment and remanded the case for a trial on the merits. The Supreme Court of Texas declined to review this decision. Given this procedural history and posture, it is clear that there has been no "final judgment," and this Court is without jurisdiction to review this case.

In the event that this Court finds there was a final judgment in the state court, it should nevertheless deny the writ because the case does not present a substantial federal question meriting the attention of the Court. Each of the Town's four arguments for granting the writ fails for lack of a sufficient basis in law and fact. Contrary to the Town's assertions: (1) the Court of Appeals of Texas correctly found that the Respondents' ("the Mayhews")

taking claim is ripe as a matter of law; (2) the Court of Appeals of Texas correctly applied federal taking law; (3) the Mayhews' vagueness challenge is not precluded by a determination that the Town's denial of development approval was a legislative act; and (4) underlying facts and factual issues are relevant to a court's consideration of the Mayhews' facial constitutional challenges. Therefore, this case does not present a substantial federal question meriting the attention of this Court, and the Court should deny the writ.

REASONS FOR DENYING THE WRIT

I.

This Court Should Deny The Petition For A Writ Of Certiorari Because The Decision Of The Court Of Appeals Of Texas Was Not A Final Judgment

The Town's jurisdictional statement invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(a). However, jurisdiction does not properly lie with this Court because the decision from which the Town appeals was not a "final judgment" within the meaning of § 1257(a).[1] Therefore, this Court should deny the Town's Petition for a Writ of Certiorari.

The Court's jurisdiction to review state court judgments is limited to the review of "[f]inal judgments or

[1] It should be noted that the Town appears to have asked this Court to direct a writ of certiorari to the incorrect court. If a writ were to issue, it should be directed to the Court of Appeals of Texas, the highest state court which has reviewed this case.

decrees rendered by the highest court of a State in which a decision could be had. . . . " 28 U.S.C. § 1257(a). In order to satisfy this finality requirement, the state court judgment must be final in two respects. *Market Street Ry. Co. v. Railroad Commission of California*, 324 U.S. 548, 551 (1945). First, the judgment must not be subject to further review or correction in any other state tribunal. *Id.* Second, the judgment must be final, as an effective determination of the litigation, not merely an interlocutory or intermediate step. *Id.* "It must be the final word of a final court." *Id.* The present case clearly does not satisfy these criteria.

Here the judgment from which the Town appeals *is* subject to further review and *is not* an effective determination of the litigation. In the proceedings below, a Texas trial court granted the Town's defensive motion for summary judgment without opinion. Upon appeal, the Court of Appeals of Texas affirmed the trial court's judgment in part, reversed the trial court's judgment in part and remanded the case to the trial court for a trial on the merits. The Supreme Court of Texas declined to review this decision and the case now resides in the Texas trial court where it is scheduled for trial on June 3, 1991. Given this procedural history and the present posture of the case, it is evident that the final judgment requirement has not been met and that the Town is merely attempting to circumvent an effective determination of the litigation. Therefore, this Court should not accept this case for review.

This Court's opinion in *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621 (1981) is instructive on this point. Similar to the present case, *San Diego Gas & Electric* involved a claim by a landowner that the City of

San Diego had "taken" its property without payment of just compensation by rezoning the landowner's property and adopting an open space plan. 450 U.S. at 624-626. The landowner won damages in a California state court action, but his claims for mandamus and declaratory relief were dismissed prior to trial. *Id.* at 626-627. Following an affirmance by the California Court of Appeals, the Supreme Court of California transferred the case back to the appellate court for reconsideration in light of its intervening decision eliminating such damage actions in lieu of mandamus or declaratory relief. *Id.* at 627-628. The appellate court then reversed the damage award and commented that there were disputed fact issues unresolved by the trial court. *Id.* at 630. These issues, the appellate court suggested, could be addressed if the landowner elected to retry the case. *Id.* The Supreme Court of California denied further review and the landowner appealed to this Court. *Id.*

This Court dismissed the landowner's appeal because of the absence of a "final judgment" under 28 U.S.C. § 1257. *Id.* This Court found that the state appellate court's decision contemplated further proceedings in the trial court and that its decision was, therefore, not final. Accordingly, this Court held that it was without jurisdiction to review the decision. *Id.* at 632-633.

Likewise, this Court is without jurisdiction to review the present case. Just as the state appellate court in *San Diego Gas & Electric* contemplated further proceedings in the trial court in order to resolve disputed issues of fact, here the Texas appellate court found that there are material issues of fact and remanded the case for trial to resolve those issues. Therefore, under *San Diego Gas &*

Electric, there has not been a "final judgment" in the Texas state courts, and this Court is without jurisdiction to review the case.

This Court's decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) does not alter this conclusion. In *Cox* this Court identified four categories of cases in which state court decisions have been treated as final judgments even though further proceedings in a state trial court were anticipated.[2] 420 U.S. at 477. A plain reading of the last three categories, in light of the procedural posture and history of the present case, clearly shows that the decision appealed from is not a "final judgment" under any of those exceptions. In addition, this Court made clear in *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981), that the first category also may not be read so broadly as to include the present case.

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[2] The four categories of cases identified by this Court are:

1. "[C]ases in which there are further proceedings . . . yet to occur in the state courts but where for one reason or another the federal issue is preclusive or the outcome of further proceedings preordained." 420 U.S. at 479.

2. Cases "in which the federal issue, finally decided by the highest court of the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480.

3. Cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481.

4. Cases where "refusal immediately to review the state court decision might seriously erode federal policy. . . . " *Id.* at 483.

In *Minnick*, this Court rejected an argument that a state court decision qualified as a "final judgment" under the first category, and it dismissed the writ of certiorari. 452 U.S. at 127. This Court emphasized that the first *Cox* category is delimited by a comment in the *Cox* opinion that, in first (and second) category cases,

> "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question."

Id. at 122 (quoting *Cox*, 420 U.S. at 478). Because this Court was not persuaded that the outcome of further state court proceedings was certain or that those proceedings would not have a significant effect on the constitutional issues presented, *id.* at 120, this Court found that it should not address the constitutional issues until the conclusion of proceedings in the state trial court and any further state court appeals. *Id.* at 127.

Likewise, this Court should not review the present case until the conclusion of a trial on the merits and any further state court appeals. The outcome of the proceedings before the Texas trial court are far from certain. Nor can one reasonably argue that a trial on the merits of the Mayhews' federal constitutional claims would not have a significant effect on the constitutional issues presented by this case. Therefore, the decision of the Court of Appeals of Texas does not qualify as a final judgment under *Cox*, and this Court is without jurisdiction to review that decision.

II.

This Court Should Deny The Town's Petition For A Writ Of Certiorari Because This Case Does Not Present A Substantial Federal Question Meriting The Attention Of The Court

In the event that this Court finds there was a final decision in the Court of Appeals of Texas, this Court should nevertheless deny the writ because the Town's arguments are meritless and fail to show that this case presents a substantial federal question meriting the attention of the Court.

A.

The Mayhews' Taking Claim Is Ripe

The Town's contentions that the Court of Appeals of Texas ("the state court") disregarded federal ripeness law and that the Mayhews' taking claim is not ripe for review are erroneous. A plain reading of the state court's opinion shows that the court found the Mayhews' taking claim ripe as a matter of law. Moreover, the court's ripeness determination is firmly supported by the facts of record.

The crux of the Town's ripeness argument is that the state court erroneously characterized the ripeness and futility issues as questions of fact to be resolved by a jury. Petition for a Writ of Certiorari ("Pet."), pp. 6-7. This assertion, however, misconstrues the state court's opinion. Nowhere in its opinion did the state court declare or even imply that the determination of ripeness (or, if applicable, the futility exception to the ripeness doctrine) is a question of fact to be left to a jury. To the contrary, the state court simply and clearly held that there is a genuine

issue of material fact regarding the Town's intention to prevent development of the Mayhews' property, and that the existence of this issue precluded entry of summary judgment for the Town. Consequently, the Town's ripeness argument is without merit.

As the Town itself noted, the state court denied the Town's motion for summary judgment because there was

> a genuine issue of material fact as to whether the Town, by rejecting [the Mayhews'] application, intended to prevent [the Mayhews'] development of [their] property in order to impose a servitude upon the property to preserve the natural and traditional character of the land for the benefit of the public.

Mayhew v. Town of Sunnyvale, 774 S.W.2d 284, 292 (Tex.App.-Dallas 1989, writ denied), Appendix to Petition for a Writ of Certiorari ("App. to Pet."), p. 19 (emphasis added). It is evident on the face of this holding that it is directed to the issue of whether the Town effected a taking of the Mayhews' property, and not to the issue of whether the Mayhews' taking claim is ripe.[3] Nevertheless, the Town seeks to alchemize the state court's holding into a conclusion that there is an issue as to the ripeness of the Mayhews' taking claim which must be resolved by a jury.

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[3] In finding that there is a factual issue regarding the Town's intention to prevent the development of the Mayhews' property, the state court was following established Texas taking law, *Mayhew*, 774 S.W.2d at 289-290, App. to Pet. 12-13 (discussing *City of Austin v. Teague*, 556 S.W.2d 400 (Tex.App.-Waco 1977), *rev'd on other grounds*, 570 S.W.2d 389 (Tex. 1978)).

On the basis of the state court's statements regarding the issue of the Town's intent to prevent the development of the Mayhews' property, the Town concludes:

> The court *apparently determined* that if the Town would not allow the Mayhews to reapply for a less intensive yet economically viable use of their property because of the Town's "intent" to take their property without just compensation, then the case was ripe for adjudication since further applications by the Mayhews would be futile.

Pet. 6 (emphasis added). However, the state court's discussion of the Town's intent to foreclose development of the Mayhews' property is a very thin reed upon which to rest a claim that the state court threw the ripeness issue to the jury. Indeed, a plain reading of the state court's opinion shows that the court examined the summary judgment proofs on the ripeness issue and found as a matter of law that the Mayhews' taking claim is ripe.

The state court was well briefed on and had ample opportunity to review the summary judgment evidence regarding the ripeness issue. On the basis of this evidence and argument, and notwithstanding the Town's insistence that the Town council was amenable to alternative development proposals at various densities, the state court concluded as a matter of law that the Town had made a "final decision" with respect to the application of its land use regulations to the Mayhews' property:

> [W]hen the time came for the town council to vote on the [Mayhews'] application, the town council balked, and considered and then rejected an entire range of development proposals with densities between 1.0 and 2.93 dwelling units per acre. Indeed, the record shows that the town council considered and rejected countless other alternatives and

> permutations of the development proposals presented by Mayhew. Thus, in the face of "political" opposition from residents of the town, the town council denied the application for development approval. . . .

Mayhew, 774 S.W.2d at 291; App. to Pet. 15. In light of this finding of ripeness, the Town's claim that the state court characterized the ripeness and futility issues as fact questions to be decided by a jury is without merit.[4]

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[4] Although there is limited authority for the Town's assertion that the question of *ripeness* is a matter of law to be determined by the court, *see Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988), *cert. denied*, 489 U.S. 1090 (1989), the Town overlooks the obvious consideration that the ultimate legal determination of ripeness cannot reasonably be made in the absence of a factual predicate to support it. *See, e.g., Hoehne v. County of San Benito*, 870 F.2d 529, 533 (9th Cir. 1989) (resolution of the ripeness issue turns on the record facts and only the facts tell the court whether a final decision has been reached). The Town effectively argues that because the ultimate legal determination of ripeness is a question of law, a court should not examine any evidence when deciding whether a claim is ripe, even if there are issues of fact relevant to the question of ripeness. However, this would be tantamount to asserting that because the construction of a contract is a question of law, a court should construe the contract without reviewing the document itself. Therefore, even though the state court correctly found the Mayhews' taking claim ripe as a matter of law, it would not have been improper for the court to reserve a decision on ripeness pending resolution of any factual disputes underlying the ripeness determination.

The Court should also note that the second of the two cases cited by the Town for the proposition that ripeness presents a question of law, *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988), is entirely devoid of any statement supporting the Town's claim. Additionally, neither *Kinzli* nor *Herrington* support the Town's assertion that a determination as to the futility exception also presents a question of law.

The state court's finding that the Mayhews' taking claim is ripe as a matter of law is also strongly supported by the record. This Court has made clear that a constitutional challenge to a land use regulation is considered ripe for judicial review when the regulatory authority has reached a "final decision" regarding the application of its land use regulations to the property at issue. *See, e.g., Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 185 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986). Although this Court has left open the question of what constitutes a "final decision," Ninth Circuit authority cited by the Town provides guidance on this issue. Under the Ninth Circuit's test, there are two requirements for a final decision: (1) a rejected development plan, and (2) a denial of a variance. *Herrington*, 857 F.2d at 569 (quoting *Kinzli*, 818 F.2d at 1454). There is indisputable evidence in the record showing that each of these two criteria is satisfied. Consequently, it is clear that the Town reached a final decision regarding the application of its land use regulations to the Mayhews' property, and that the Mayhews' taking claim is ripe as a matter of law.

It is undisputed that, following extensive discussions and negotiations between the Mayhews and the Town, and more than six months after the Mayhews filed their application for planned development approval, the Town rejected the Mayhews' development plan, thus satisfying the first element of the Ninth Circuit's final decision test. Additionally, the Town has admitted in its Petition that the Town's zoning ordinance did not contain a variance procedure for the Mayhews to follow after the denial of their application. Pet. 13. In the absence of such a legally

viable option, the second element of the Ninth Circuit's final decision test need not be satisfied. *Herrington*, 857 F.2d at 569-570. Therefore, following the Ninth Circuit authority which is urged on this Court by the Town, the Mayhews have satisfied this Court's final decision requirement, and the state court's finding of ripeness as a matter of law is correct.

The state court's finding that the Mayhews' taking claim is ripe as a matter of law also satisfies a futility analysis because even if the Town did not reach a "final decision," the record shows that it would have been futile for the Mayhews to pursue further development proposals. *MacDonald*, 477 U.S. at 350 n. 7 ("[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures" to determine what use, if any, may be made of his property).

Although this Court has not established a "test" for determining futility, it suggested in *MacDonald* that at least one "meaningful application" for development approval must be submitted before the futility exception applies. *Id.* at 352 n. 8. *See also Kinzli*, 818 F.2d at 1454-1455. The record shows unambiguously that not only did the Mayhews submit a meaningful application for development approval, but also that the Town considered and rejected numerous other proposals. Thus, it would have been futile as a matter of law for the Mayhews to submit yet another additional application for development approval.[5]

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[5] According to the Town, "it was incumbent upon [the Mayhews] to pursue 'a proposal for less intense development' "

(Continued on following page)

The facts supporting this conclusion were aptly noted by the state court:

> Mayhews' application was considered for a period of more than six months. Mayhew had initiated discussions with the town in regard to the proposed development more than a year prior to the town's decision, meeting with town officials on more than twenty occasions *prior* to submitting the application. Mayhew worked closely with representatives of the town, including the town planner, in coming up with an acceptable design proposal, spending over one-half of one million dollars in providing information and studies to provide information showing that the proposed development satisfied the requirements of the town's planned development ordinance and would be an asset to the town. In November of 1986, about half way

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(Continued from previous page)

following the denial of their application for development approval in order to satisfy the futility exception. Pet. 13 (quoting *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717, 722 (10th Cir. 1989). Although a determination of futility arguably requires at least one meaningful application for development approval, *MacDonald*, 477 U.S. at 352 n. 8, the futility exception would be emasculated by an absolute requirement that the developer pursue a proposal for less intense development following the denial of an application for development approval. Indeed, given such a requirement, a regulatory body could force a developer to make successive proposals for less intense development and thereby forestall any legal challenge by the developer indefinitely. Therefore, it would be absurd to conclude that the Mayhews are required at this stage to advance a proposal for less intense development before their claims may be considered ripe. *See* discussion below regarding the history of the Mayhews' attempts to gain development approval.

> through this process, the town decided to revise its comprehensive plan by substantially decreasing the amount of density that would be permitted in the town, all while Mayhew's application was pending. Subsequently, Mayhew's representatives met with town officials, including the town attorney, the town manager, [and two town council members], to discuss the proposed development. At that meeting, Mayhew agreed to scale down the application substantially from the 5,025 units originally sought to 3,600 dwelling units and to abandon the apartments because of the town's "concerns" over the inclusion of apartments and other forms of low and moderate cost housing in the proposed development. In the end, Mayhew acceded to the demands of town officials. But when the time came to vote on the application, the town council balked, and considered and then rejected an entire range of development proposals with densities between 1.0 and 2.93 dwelling units per acre. Indeed, the record shows that the town council considered and rejected countless other alternatives and permutations of the development proposals presented by Mayhew.

Mayhew, 774 S.W.2d at 290-291, App. to Pet. 14-15 (emphasis in original). As this passage illustrates, it would have been futile, both as a practical matter and as a matter of law, for the Mayhews to file another formal application for development approval. Therefore, even if the Town's rejection of the Mayhews' application was not a "final decision," the state court nevertheless correctly found that the Mayhews' taking claim is ripe. *MacDonald*, 477 U.S. at 352 n. 8.

The Town denies in its Petition that it would have been futile for the Mayhews to pursue another development proposal and claims that the Mayhews' taking

challenge is not ripe as a matter of law. Pet. 7-9. The sole basis for the Town's claim is its insistence that "an appropriate density figure for review has yet to be determined." Pet. 8. This argument, however, is not only refuted by the undisputed evidence discussed above showing that the Town denied a meaningful application for development approval and rejected attempts at compromise, it is also grounded on a tortured hypothetical reading of the record which violates established summary judgment rules of review.

According to the Town, the Town Council "was receptive to a plan with a proposed density of substantially more than one unit per acre but less than the 3.2 units per acre demanded by the Mayhews."[6] Pet. 7. In order to support this statement, however, the Town has turned the standard for reviewing a motion for summary judgment on its head.[7] The Town, the *movant* on summary judgment below, has effectively asked this Court to resolve all inferences in its favor and to indulge in speculation as to a development density level which would have been supported by the Town Council:

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[6] As it has repeatedly done throughout the course of this litigation, the Town again misrepresents the density of development under the Mayhews' plan as 3.2 dwelling units per acre rather than the 2.93 dwelling units per acre which the plan actually called for.

[7] It is well established that in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the *non-movant* is to be taken as true and every reasonable inference must be indulged in favor of the *non-movant* and any doubts resolved in its favor. *Nixon v. Mr. Property Management Co., Inc.*, 690 S.W.2d 546, 548-549 (Tex. 1985).

> The discussions of the Town Council conclusively establish that rigid adherence to one acre zoning unequivocally was not a condition for the Mayhews' planned development approval, as density levels of 2.0, 2.3, 2.6, and 3.3 units per acre were deemed acceptable by the individual councilmembers. *Assuming the most restrictive scenario,* a plan asking for 2 units per acre would have passed by a 4-to-1 vote.

Pet. 7, footnote (emphasis added). This mere conjecture violates summary judgment rules and is insufficient to prove that an appropriate density figure for review has yet to be determined.

In summary, the Town's ripeness argument fails to present a substantial federal question meriting the attention of this Court. The state court correctly found that the Mayhews' taking claim is ripe as a matter of law, and that finding is firmly supported by the summary judgment evidence. Therefore, this Court should reject the Town's Petition for a Writ of Certiorari.

B.

The State Court's Taking Analysis Was Consonant With Established Taking Jurisprudence

The Town's second argument for granting its Petition for a Writ of Certiorari is that the state court erred in its consideration of the Mayhews' taking claim because the court "improperly focused its analysis upon the Town's decision to deny the Mayhews' application without considering the remaining uses available to the Mayhews by the Town's Zoning Ordinance" and thereby failed to address the second prong of the taking test set forth in

Agins v. City of Tiburon, 447 U.S. 255 (1980).[8] Pet. 14-15. The Town's argument is misdirected for at least two reasons.

First, the Town incorrectly assumes that the application of the Town's zoning ordinance to the Mayhews' property substantially advances a legitimate state interest and therefore does not, as a matter of law, effect a taking under the first element of the *Agins* analysis.[9] Second, even if the state court did not expressly address the second element of the *Agins* taking test, the record shows that, at the very least, there is a genuine issue of material fact with regard to the economic viability of any remaining uses. In either case, there is no substantial federal question which merits the attention of this court. Rather, there are only questions of fact which must be resolved at the trial which the Town now so strenuously seeks to avoid.

With respect to the first element of the taking analysis, the Town again seeks to stand the summary judgment standard of review on its head. Obviously indulging every reasonable inference in its favor, the Town baldly asserts that "there can be no doubt that the conservation and preservation of open space, and the

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[8] In *Agins* this Court held that:

> [t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land. . . .

447 U.S. at 260 (citations omitted).

[9] A regulation that fails *either* prong of the *Agins* test constitutes a taking. *Agins*, 447 U.S. at 260; *Nollan v. California Coastal Commission*, 483 U.S. 825, 835-836 (1987).

desire of the Town to protect its residents from the 'ill effects of urbanization' are legitimate state interests that are substantially advanced by the Town's one-acre zoning provisions." Pet. 15. The Town's claim, however, has no basis in law or fact.

While the Mayhews do not doubt that the preservation of open space and the protection of residents from the ill effects of urbanization are legitimate state interests, it is far from settled that the Town's regulations and their application to the Mayhews' property will promote those purposes. At a minimum, there is a genuine issue of material fact with respect to this inquiry. Therefore, the state court was correct in reversing the granting of summary judgment to the Town.

As support for its argument, the Town misrepresents the holding of *Agins v. City of Tiburon*, 447 U.S. 255 (1980), by suggesting that *Agins* stands for the proposition that "one acre zoning" furthers legitimate state interests. In fact, the *Agins* Court never considered whether it was reasonable to believe that the ordinance *as applied* advanced the proffered purposes. Instead the Court simply accepted the findings of the California Legislature for the purposes of the *facial challenge* with which it was presented:

> The State of California has determined that the development of local open-space plans will discourage the "premature and unnecessary conversion of open-space land to urban uses."

Agins, 447 U.S. at 261.

Additionally, the ordinance sustained in *Agins* was markedly different from the Town's zoning ordinance

because the *Agins* ordinance specifically provided for maximizing open space. *Agins*, 447 U.S. at 257, 262. *See also Agins v. City of Tiburon*, 157 Cal. Rptr. 372, 598 P.2d 25, 27 (Cal. 1979). Unlike the *Agins* ordinance, however, the Town's zoning ordinance requires "cookie cutter" development of one acre lots with single family homes uniformly positioned and centered, one to a lot. In addition, notwithstanding the Town's alleged interest in preserving open space, its zoning ordinance includes requirements for curbs, gutters and alleys. Furthermore, the Town's ordinance does not provide for clustering to maximize open space nor does it consider whether the development would be compatible with adjoining open space or would preserve the surrounding environment. Therefore, the Town's reliance on *Agins* as proof that one-acre zoning furthers legitimate state interests as a matter of law is misplaced.

The Town's contention that one-acre zoning preserves open space and protects its residents from the ill effects of urbanization is also without foundation in fact. For example, the Town's own professional land use planner testified in his deposition that development of the vacant land in the Town with one-acre lots would eliminate the Town's open space and destroy the rural, rustic and countryside character of the Town. Nonetheless, solely on the basis of its sweeping mischaracterization of the holding in *Agins*, the Town now claims "there can be no doubt" that its one-acre zoning advances its claimed state interests. It is evident, however, that the only way the Town's one-acre zoning will preserve open space is if, as the Mayhews allege, the Town's regulations prevent *all development* of the Mayhews' property. Therefore, the

application of the Town's zoning ordinance to the Mayhews' land has effected a taking of that land as a matter of law.[10]

Finally, even if a taking is not established as a matter of law, at a minimum there is a material factual issue as to whether the Town's zoning ordinance, as applied to the Mayhews' property, substantially advances legitimate state interests, and the Mayhews have a well-established right to present evidence on this issue at a trial. *See United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938) ("Where the existence of a rational basis for legislation whose constitutionality is attacked depends on facts beyond the sphere of judicial notice, *such facts may properly be made the subject of judicial inquiry* . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.") (citations omitted) (emphasis added).

Assuming *arguendo* that the Town's one-acre zoning advances legitimate state interests, the Town's regulations nevertheless effect a taking of the Mayhews' land because they prohibit any economically viable use of that land. *See Agins*, 477 U.S. at 260. At a minimum, there is a material factual issue with respect to this second

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[10] *See, e.g., Penn. Central Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 311-312 (1987); and *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 834-836 (1987).

element of the *Agins* taking test, and this issue is sufficient to sustain the state court's determination that the Town is not entitled to summary judgment on the Mayhews' constitutional claims.

The record established in the state courts shows that the Town's zoning ordinance and its decision to deny development approval deprive the Mayhews of all economically viable use of their land. For example, the summary judgment evidence shows that there is no real market for one acre lots in the Town and that the only one-acre zoned subdivision developed to the Town's standards was an economic disaster. In addition, the summary judgment proofs establish that the Mayhews could expect to market no more than 11 one-acre lots per year, a factor which would require more than 100 years to market the Mayhews' property, that it is economically impossible to develop the Mayhews' property according to the Town's requirements, and that agricultural use of the property is not economically viable (*i.e.* income or land rents from agriculture were insufficient to cover ownership and maintenance costs).

In response to this evidence, the Town merely points to two appraisals prepared for the Mayhews which show a substantial value for the Mayhews' property prior to the Town's denial of the application and a significant diminution in value following the Town's denial. Pet. 17. The first appraisal, however, has virtually no probative value because it was based on comparable land sales, most of which involved property located *outside of* the Town, and it assumed that the development of the property would be permitted in accordance with the development trends in the general area, an unwarranted

assumption given the Town's decision regarding the Mayhews' application. In addition, the conclusions of the second appraisal are controverted by the Mayhews' summary judgment proofs. Therefore, even if the Town has not taken the Mayhews' property as a matter of law, the most that can be said is that the record presents a genuine issue of material fact as to whether an economically viable use of the Mayhews' property remains.

Similarly unfounded is the Town's claim that it never "took" anything from the Mayhews because the Mayhews possessed no reasonable investment-backed expectations (*i.e.*, property rights). *See* Pet. 17-19. One of the Mayhews has owned over 70% of the subject property for more than 40 years, long before the Town instituted its one-acre zoning. In light of this long period of ownership, it is absurd to suggest that the Mayhews' could have no reasonable investment-backed expectations in their land.

Moreover, the Town's argument that prior knowledge of zoning restrictions precludes a reasonable investment-backed expectation based on less restrictive zoning demeans the constitutional stature of property rights. *See* Pet. 18-19. To suggest that an otherwise overly restrictive regulation is constitutional so long as it was put in place prior to the current ownership is simply wrong. Indeed, this Court recently rejected this very argument:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Nollan, 483 U.S. at 833 n.2. Consequently, it is clear that the Mayhews possess legitimate investment-backed expectations and that, at a minimum, there is a genuine issue of material fact as to whether the Town's denial of their application denied them all economically viable use of their land.

In summary, the Town's argument that the state court erred by allegedly failing to consider alternative uses of the subject property is plainly erroneous. The Town incorrectly assumes that its zoning ordinance advances legitimate state interests, and it fails to show, as a matter of law, that there are economically viable uses of the Mayhews' property under the Town's one-acre zoning. The state court was correct in finding that the Town was not entitled to summary judgment. Therefore, this Court should reject the Town's Petition.

C.

The Mayhews' Vagueness Challenge Survives The State Court's Decision That The Town's Denial Of Development Approval Was A Legislative Act

The Town's third argument arises from the state court's determination that the Town's consideration of the application for planned development approval was a legislative act for the purposes of Civil Rights Act immunity. The Town claims that the state court's finding in regard to immunity means that the Mayhews' due process claims should be dismissed. Pet. 19-22. While it is undoubtedly true that procedural due process rights to notice and hearing do not attach to legislative acts, the Town's argument cuts too far and is without merit.

The Town erroneously assumes that when a vagueness claim bears the caption "procedural due process," the challenged law does not have to comply with the constitutional requirements for minimal certainty, simply because the law is legislation. This assumption is unfounded.

The vagueness doctrine requires that legislation be sufficiently definite to give affected persons fair warning of what is permitted and prohibited:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence the opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, *laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.*

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (emphasis added) (footnotes omitted). This requirement, however, is fundamentally different than the procedural due process guarantees of notice and hearing.[11] Although

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[11] The court in *Jackson Court Condominiums, Inc. v. City of New Orleans*, 665 F.Supp. 1235 (E.D. La. 1987), *aff'd*, 874 F.2d 1070 (5th Cir. 1989), recognized a distinction between the procedural due process claims (notice and hearing) and the vagueness claims raised. Significantly, the fact that the action challenged there was determined to be legislative did not have any effect on the vagueness challenges, although the procedural due process challenges were dismissed.

the Constitution may not command that all persons are to have notice of and an opportunity to be heard on pending legislation, it does require that legislation satisfy minimal standards of certainty. Therefore, the mere fact that the Mayhews' vagueness claims are denominated "procedural due process" does not defeat those claims nor does it shield the Town's ordinances from scrutiny under a vagueness analysis.

D.

The State Court's Treatment Of The Mayhews' Facial Challenges Was Consistent With Settled Law

The Town claims in its final argument that the state court incorrectly found that the Mayhews' facial constitutional challenges[12] are predicated upon disputed factual issues. Pet. at 22. This argument fails because, as a plain reading of the state court's opinion shows, the court did not specifically address the Mayhews' facial claims. Moreover, this Court has made clear that, contrary to the Town's assertion, the underlying facts and factual issues are relevant to a court's consideration of each of the Mayhews' facial challenges.

For example, in *United States v. National Dairy Products Corp.*, 372 U.S. 29, 31-32 (1963) this Court stated that it does not evaluate in the abstract the validity of a statute which is attacked as vague on its face. Additionally, in *New York State Club Ass'n, Inc. v. City of New*

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[12] The Mayhews have asserted three facial challenges in their petition for relief claiming violations of their rights to substantive due process and equal protection, and of the vagueness doctrine. They have also asserted "as applied" challenges under each of these doctrines.

York, 487 U.S. 1, 17-18 (1988) this Court found that a facial equal protection challenge of an amendment to a local human rights law failed because there was no evidentiary showing that legislatively-created classes were identical in critical respects. Finally, given that the rational basis test employed in a non-suspect classification equal protection challenge (such as that involved in *New York State Club Ass'n*, 487 U.S. at 16) is essentially the same as the test employed in a substantive due process challenge, *see Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470 n. 12 (1981), it follows that facts and factual issues are also relevant to consideration of a facial substantive due process claim. In light of the above cases, it is clear that facts and factual issues are relevant to the Mayhews' facial claims, and the Mayhews should have an opportunity to present facts and attempt to resolve any factual issues in their favor at a trial on the merits of those claims.

CONCLUSION

This Court is without jurisdiction to review this case because the state court's decision is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a). Additionally, even if there was a final decision in the state court, this Court should deny the writ because the Town has failed to establish that the state court committed any error or that this case presents a substantial federal question meriting the attention of this Court.

Therefore, the Mayhews respectfully pray that this Court deny the Petition for a Writ of Certiorari to the Supreme Court of the State of Texas.

Respectfully submitted,

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